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IN THE

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Willcox

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BY

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AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE, ESQ.,

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WITH

TABLES OF THE NAMES OF CASES ARGUED, AND THE PRINCIPAL MATTERS.

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1872.

JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOHN PATTESON, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.

ATTORNEY GENERAL.

Sir JOHN JERVIS, Knt.

SOLICITOR GENERAL.

Sir DAVID DUNDAS, Knt.

A

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CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Hilary Vacation,

1 VICTORIA.

The Judges who usually sat in Banc during this Vacation(*a*) were

Lord DENMAN, C. J. — COLERIDGE, J.

PATTESON, J. — WIGHTMAN, J.

WRIGHTUP *v.* GREENACRE.

The clause (sect. 1) of stat. 29 Eliz. c. 4, giving treble damages against sheriffs, &c., taking more than the poundage there allowed, is not repealed by stat. 7 W. 4 & 1 Vict. c. 55, which (sects. 2, 3) permits sheriffs, &c., to take certain additional fees, if previously sanctioned by the Judges, and makes the officer exacting more than the charges so sanctioned punishable as for a contempt.

Therefore, a count in debt, claiming treble damages against a sheriff's officer for exacting, in addition to certain fees sanctioned by the Judges, a sum exceeding the poundage allowed by stat. 29 Eliz. c. 4, was held good on demurrer.

DEBT. The first count of the declaration stated that Richard Hanbury Gurney and others recovered a judgment in B. R. against the now plaintiff for *1000*l.* debt and 9*l.* 6*s.* damages. That, after the passing [*2 of an act, &c. (7 W. 4 & 1 Vict. c. 55, "for better regulating the fees payable to sheriffs upon the execution of civil process"), the Judges of the Queen's Bench, Common Pleas and Exchequer (naming them), the said several Courts being all the Courts of law at Westminster, did sanction and authorise any sheriff or his officers concerned in the execution of any fieri facias directed to such sheriff to demand, take and receive the following fees and none other: that is to say, &c. The

(*a*) The Court sat in Banc on the 2d, 3d and 4th of February, and from the 8th to the 9th, inclusive, and on the 25th.

court then set forth the several amounts allowed to be taken as fees; the material ones being: To the bailliffs for executing a warrant on a fi. fa., 1*l.* 1*s.*, if the distance of the place of levy from the sheriff's office or the bailiff's residence should not exceed five miles, but, if it should exceed five miles from both, then 1*l.* 1*s.* and the further fee of 6*d.* for every mile of the distance of such place from the office or the bailiff's residence, whichever was the most distant; for the man left in possession, if not boarded, 5*s.* per day; for certificate of sale to save auction duty, 2*s.* 6*d.* Which said fees, and no more, were continually, from the time when the Judges so sanctioned and authorised the same until and at the time of the committing of the grievance, &c., from time to time allowed by the officers of the said Courts of law at Westminster, charged with the duty of taxing costs in such Courts, under the sanction and authority of the Judges of the said Courts respectively, to be demanded, taken, &c., by any sheriff or his officers concerned in the execution of a writ of fi. fa. directed to such sheriff. Averment that never, before the committing, &c., did the Judges of the said Courts respectively,
*3] or of any one of *them, sanction or authorise any other fee, &c. The count further stated that the then plaintiffs, on, &c., for obtaining satisfaction of their debt, &c., sued out of the Court of Queen's Bench a fi. fa. (reciting it), indorsed "to levy 296*l.* 11*s.*, and interest thereon from the 25th day of November, A. D. 1843, and 1*l.* 1*s.* for execution besides," &c.; which writ was delivered to the sheriff of Norfolk to be executed: and the sheriff afterwards, for having execution of the same writ, made his warrant in writing directed to the defendant and one Matthew Watts; which said defendant then, and from thence until, &c., was one of the bailiffs of the said sheriff; by which warrant the sheriff commanded, &c.: the count then set forth the warrant, containing a direction to levy 296*l.* 11*s.* and interest, and 1*l.* 1*s.*, &c., besides, &c.: which warrant was delivered by the sheriff to defendant to be executed: and, by virtue thereof, defendant, so being bailiff, &c., afterwards, and before any other execution of the writ, and before the return, to wit, on, &c., seized and took in execution goods of the now plaintiff of great value, to wit, &c., and levied thereout the said 296*l.* 11*s.*, and 10*s.* (the whole amount due) for interest, and 1*l.* 1*s.* for execution, &c. Averment, that the distance of the place of levy from the sheriff's office and from the bailiff's residence exceeded five miles, and that the defendant's residence, which was the most distant, was ten miles from the place of levy, "whereby the defendant became entitled to take the said fee of 1*l.* 1*s.* so sanctioned by the said Judges and allowed as aforesaid, and also 5*s.* being the said fee of 6*d.* a mile for each and every of the said ten miles, so sanctioned and allowed as aforesaid." Then followed similar aver-
*4] ments as to sums of *1*l.* 10*s.* for a man left in possession, and 2*s.* 6*d.* for a certificate to save auction duty in respect of an anticipated sale by auction, which did not take place. "And so the plaintiff

says that the defendant, under and by virtue of the said statute, was entitled to demand, take and receive, and did, to wit, on, &c., take and receive, from the plaintiff in respect of the said execution, the several sums of 1*l.* 1*s.*, 5*s.*, 1*l.* 10*s.* and 2*s.* 6*d.*" (the sums previously stated), "as and for such fees as aforesaid, and no more, in respect of the matters for which the said fees were so sanctioned and allowed as aforesaid." A like averment followed as to a charge of 3*l.* 0*s.* 6*d.* for work and expenses in respect of the intended sale by auction. "Yet the defendant, so being such bailiff as aforesaid, and not regarding the act of parliament made, &c. (reciting stat. 29 Eliz. c. 4, "to prevent extortion in sheriffs, undersheriffs, and bailiffs of franchises or liberties, in cases of execution"), "but contriving to injure the plaintiff by reason and colour of his office," &c., "after the said delivery of the said warrant," &c., "and within one year next before the commencement of this suit, to wit, on," &c., "over and above the said sums of 1*l.* 1*s.*, 5*s.*, 1*l.* 10*s.*, 2*s.* 6*d.* and 3*l.* 0*s.* 6*d.*, wrongfully, illegally and oppressively had, received and took of the now plaintiff, for serving and executing the said writ, more and other consideration and recompense than by the said lastly mentioned statute is limited and appointed, that is to say the sum of 78*l.* 10*s.*, which sum exceeded by a large sum, to wit, by 68*l.* 11*s.*, the consideration and recompense of 12*d.* of and for every 20*s.* of 100*l.*, parcel of the money so levied as aforesaid, and 6*d.* of and for every 20*s.* of the excess of the said money so levied over and above 100*l.*, which was and is the consideration and recompense *limited and appointed by the last mentioned statute; contrary to the form of the statute in such [*5 case made and provided: Whereby the plaintiff then was, and is, injured and aggrieved to the amount of the said sum of 68*l.* 11*s.*, and has sustained damages to that amount. Whereby, and by force of the said last mentioned statute in that behalf made, the defendant hath forfeited to the plaintiff treble the amount of the said damages, to wit, 205*l.* 13*s.* And thereby, and by reason of the non-payment thereof, an action hath accrued," &c.

Demurrer, assigning for cause: "That the said first count is repugnant and inconsistent in this, that it is stated and alleged, in and by the said 1st count, that the defendant was entitled to take certain fees, charges and moneys over and above the poundage limited and appointed by the statute passed in the reign of Queen Elizabeth, mentioned in the said 1st count, and yet the plaintiff by the said 1st count seeks to recover from the defendant a penalty for taking fees, charges and moneys over and above such poundage: and also for that the said 1st count is informal," &c. Joinder.

The demurrer was argued in Michaelmas term, 1845.(*a*)

Sir *F. Kelly*, Solicitor General, for the defendant. Stat. 29 Eliz. c. 4, s. 1, enacts "that it shall not be lawful" for any sheriff, bailiff, &c.,

(*a*) November 14th. Before Lord DENMAN, C. J., WILLIAMS and WIGHTMAN, Js.

their officers, &c., to take "for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person" "more or other consideration or recompense, than in this present act is
*6] and shall be limited *and appointed, which shall be lawful to be had, received and taken, that is to say," 12*d.* of and for every 20*s.*, where the sum does not exceed 100*l.*, and 6*d.* of and for every 20*s.* above 100*l.*, that he or they shall levy, extend, or take the body for; on pain that the sheriff, undersheriff, &c., who "shall directly or indirectly do the contrary, shall lose and forfeit to the party grieved his treble damages, and shall forfeit the sum of 40*l.*" for each offence, one moiety to the Queen, the other to the informer. The question here is, whether that statute, so far as it imposes a penalty for taking more than the poundage thereby given, is not repealed by stat. 7 W. 4 & 1 Vict. c. 55, which, by sect. 2, provides: "That from and after the passing of this act it shall be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several Courts of law at Westminster charged with the duty of taxing costs in such Courts, under the sanction and authority of the Judges of the said Courts respectively." Sect. 3 enacts: "That any sheriff, officer, or minister acting in the execution of process directed to any sheriff or sheriffs, or engaged or concerned therein, who shall extort, demand, take, accept, or receive from any person or persons any fee or fees, gratuity, or reward not allowed as aforesaid, or greater in amount than as allowed as aforesaid, such sheriff, or other his officer or minister, upon complaint thereof made against him to any of the said Courts," and proof made upon oath, &c., "to the satisfaction of the Court to which the said complaint shall be made, that such sheriff, officer," &c., hath offended therein as aforesaid, then and in every such case every
*7] *such sheriff, officer," &c., "shall be adjudged guilty of a contempt of such Court, and punished by such Court accordingly." The declaration here is so framed as to show that the defendant took more than is allowed by the statute of Elizabeth, and more, also, than is allowed by the statute of Victoria. The latter act, though it legalizes an increased compensation, does not in terms repeal the act of Elizabeth, which, to the extent of the taking of fees there permitted, was enabling: but the penalty imposed by the former act must be repealed; for, if it be not, a party charged as in this declaration may be subject to the treble damages and 40*l.* penalty, and also to punishment for a contempt under the later statute. The reasonable construction must be that the sole penalty now subsisting is the punishment for contempt. If the penalty be that given by the statute of Elizabeth, the amount recovered ought to be three times the excess above the amount of compensation legalized by that statute; but that is inconsistent with the present complaint, the defendant here being charged only with taking more than is allowed by the regu-

lation of the judges under stat. 7 W. 4 & 1 Vict. c. 55. [Lord DENMAN, C. J. Suppose the Judges had left the old allowance unaltered.] If they had published a scale, that, and not the old act, would have been the binding authority: though, possibly, the case might have been different if they had laid down no scale. The new act does not abrogate the right to poundage given by the statute of Elizabeth; But it abolishes the limit there laid down, when the Judges, by their order under the statute of Victoria, have sanctioned an additional compensation; and it prescribes a new restriction, enforced by the penalties of a contempt. *In that [*8
case, therefore, if the limit prescribed by the Judges be transgressed, so that there is an excess over the aggregate of compensation allowed by the two acts, recourse must be had, not to the old but to the recent statute. The words of the two statutes are inconsistent with any other construction; the first gives authority to take compensation to a stated amount and not more, on pain, to those who shall directly or indirectly do the contrary, of certain forfeitures; the second expressly permits doing the contrary under a different penalty imposed on parties who shall exceed to a certain extent. An offence is abolished and a new one created. The point now before the Court was raised, but not decided, in *Usher* v. *Walters*, 4 Q. B. 553, where, however, PATTESON and WILLIAMS, Js., seem at least to have doubted whether the recent act had not repealed the earlier. It has often been held that a preceding act is in effect repealed by a subsequent one, without any words of repeal, where the latter act imposes a different penalty for the same offence, or introduces a different provision for the same subject matter; *Rex* v. *Cator*, 4 BURR. 2026; *Rex* v. *The Trustees of the Northleach & Witney Roads*, 5 B. & Ad. 978 (which cases are commented upon in *Usher* v. *Walters*); *Ex parte Caruthers*, 9 East, 44. In *Curlewis* v. *Bird*, 1 Dowl. P. C., N. S. 752, referred to in *Usher* v. *Walters*, the question arose on sect. 4 of stat. 7 W. 4 & 1 Vict. c. 55; and COLERIDGE, J., certainly intimated that "the defendant might have brought his action for extortion, independent of this act." But that was an incidental remark on a point not under adjudication. In *Davies* v. *Griffiths*, 4 M. & W. 377, a case also under the statute *of Victoria, Lord ABINGER and PARKE, B., were of opinion that [*9
this act did not interfere with the right to poundage: but that may be so, and yet the law may be altered as to the penalty to be incurred by demanding more compensation than is due under one or both of the statutes.

Martin, contrà. Stat. 7 W. 4 & 1 Vict. c. 55, does not impliedly repeal stat. 29 Eliz. c. 4, as to the penalty for extortion. It is unnecessary to rely upon the dictum in *Curlewis* v. *Bird*, 1 Dowl. P. C., N. S. 752, which is a mere intimation of opinion on a point not discussed. [Lord DENMAN, C. J. It is not even an expression of opinion as to the penalties recoverable.] The observation of PATTESON, J., in *Usher* v. *Walters*, 4 Q. B. 553, may also be considered as a dictum not meant to

be decisive. But the present case may be determined by the general rules of construction. One of these is that "every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto;" 7 Bac. Abr. 442, 7th ed., tit. *Statute* (D), citing *Foster's Case*, 11 Rep. 56 *b*, 61 *a*, 62 *b*. And this was the principle of decision in *Rex* v. *Cator*, 4 Burr. 2026, and *Rex* v. *The Trustees of the Northleach and Witney Roads*, 5 B. & Ad. 978, where the statutes, if not contrary to each other, were inconsistent. In *Ex parte Caruthers*, 9 East, 44, the later statute introduced a condition which necessarily restricted the operation of the earlier one. The only question then, in the present case, is, whether the act of Victoria is so inconsistent with that of Elizabeth as, practically, to repeal it. "Subsequent statutes, which add accumulative penalties, and institute new methods of pro-
*10] ceeding, do not *repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words:" and "the law does not favour a repeal by implication, nor is it to be allowed unless the repugnancy be quite plain:" 7 Bac. Abr. 443, tit. *Statute* (D). Here no such repugnancy is found. The act of Elizabeth prescribed a remuneration in the cases only of extent or execution executed upon body, lands or goods, and limited the fees in those cases. If there had been a proviso in the same statute that the judges might, if they thought proper, add to the remuneration, it would clearly not have been inconsistent with the first enactment. The Judges might never have increased the fees; and then the original enactment would have been untouched. The enactment now in question does not require any different view. Fees on execution were allowed by stat. 23 H. 6, c. 10, s. 1, as well as by stat. 29 Eliz. c. 4, s. 1. The act of Victoria repeals in terms the former statute, as to such allowance, but not the latter; and the intention seems to be that the remuneration given by that act may still be taken, with such increase, if any, as the Judges may think proportionate to the work actually done; and that for services not considered in the statute of Elizabeth remuneration may also be taken, to such extent as the courts may sanction. There is nothing that renders the provision for treble damages in stat. 29 Eliz. c. 4, s. 1, inapplicable to that state of the law. Sect. 3 of stat. 7 W. 4 & 1 Vict. c. 55, gives a summary authority to be exercised by the Court over its officers; but this provision is cumulative, and does not take away the remedy which individuals had by the proceeding for treble damages; though, if that proceeding were already instituted, the Court (according to the
*11] practice on motions for criminal *information) would probably not interfere. [Lord DENMAN, C. J. If the Judges order that for services comprehended in the act of Elizabeth an amount shall be taken beyond the amount permitted by that act, is not it, so far, repealed?] It is, as to the amount; but the provision for treble damages will still attach to the excess over the amount allowed by the joint effect of the

two statutes. [WIGHTMAN, J. You add to the words "more recompense," &c., in stat. 29 Eliz. c. 4, s. 1, the words "except so much as may be warranted by a future act of parliament."] That is a reasonable construction. According to *Davies* v. *Griffiths*, 4 M. & W. 377, the right to poundage given by the statute of Elizabeth remains untouched, while the Courts are enabled to increase the other remuneration. It is right, and must have been contemplated, that, while the former advantages are preserved to the officer, his former liability to damages in case of excess should continue likewise.

Sir *F. Kelly*, in reply. In proceeding for a statutory penalty, the precise words of the statute must be adhered to; if they cannot, the penalty can no longer be enforced. The act of Elizabeth on which this declaration is founded prohibits the taking more than 12*d.* in every 20*s.* for poundage, and an additional 6*d.* in certain cases: the complaint here is of taking more than the 12*d.* and 6*d.*, and more than certain farther sums which are acknowledged to be allowable. The principle of a quantum meruit cannot be adopted in a penal action; nor is it permitted, in such an action, to suppose a proviso, as was suggested on the other side.

Cur. adv. vult.

*Lord DENMAN, C. J., in this vacation (February 8th), delivered [*12
the judgment of the Court.

This was a demurrer to the first count of a declaration to recover treble damages against the defendant, as one of the bailiffs of the sheriff of Norfolk, under stat. 29 Eliz. c. 4, s. 1. The count stated the recovery of a judgment against the plaintiff; that, after the passing stat. 7 W. 4 & 1 Vict. c. 55, the Judges sanctioned and authorised sheriffs and their officers to take certain specified fees upon executing writs of fi. fa.; that no other fees were allowed by the Judges than those specified; that a writ of fieri facias was issued against the goods of the defendant upon the judgment, directed to the sheriff of Norfolk, and indorsed to levy 296*l.* 11*s.* and interest, and 1*l.* 1*s.* for execution, besides, &c.; that the sheriff made his warrant to the defendant; that the defendant, as bailiff of the sheriff, levied of the plaintiff's goods 296*l.* 11*s.*, and 10*s.* for interest, and also 1*l.* 1*s.*, as directed by the indorsement on the writ; that the defendant was also entitled to take certain specified fees as allowed by the Judges under stat. 7 W. 4 & 1 Vict. c. 55, but that the defendant, over and above those fees, took more than allowed by the statute 29 Eliz., and injured the plaintiff to the amount of the excess, who thereupon became entitled to treble damages under the statute of Elizabeth.

It was contended on the part of the defendant that the penal clause in the statute of 29 Eliz. was by implication repealed by the statute of 7 W. 4 & 1 Vict. as far as regards the penalty: and that is the only point for our consideration.

The statute of 7 W. 4 & 1 Vict. c. 55, is entitled "An act for better regulating the fees payable to sheriffs upon the execution of civil pro-

*13] cess." The *preamble states it to be expedient to amend the laws relating to the fees payable to sheriffs, bailiffs and others the officers of sheriffs, and to give the Courts of record at Westminster a due control over such fees, and to provide a summary remedy against such officers as shall receive greater fees than by law they shall be entitled to. The act then repeals, wholly or in part, three ancient statutes relating to sheriffs, and enacts that it shall be lawful for sheriffs and their officers to receive such fees, and no more, as shall be allowed by the taxing officers of the Courts of Westminster under the sanction of the Judges; and further enacts that any sheriff or officer receiving any fee, gratuity or reward, greater than is allowed, shall be guilty of a contempt of Court and punished by the Court accordingly.

It is remarkable that there is no mention whatever made in this act of parliament of the statute 29 Eliz. c. 4. Whether this was accidental or by design, it is not very material now to enquire; but, very shortly after the act passed, it was decided, in *Davies* v. *Griffiths*, 4 M. & W. 377, that the act of 1 Vict. was not at all inconsistent with that of 29 Eliz.; that they might both well stand together; and that the sheriff would be entitled to his poundage under the statute of Elizabeth, and also to any additional fee that might be allowed by the Judges under the 1 Vict. In the subsequent case of *Usher* v. *Walters*, 4 Q. B. 553, in this Court, reported in 4 Q. B., it was contended that the statute of Elizabeth was at all events repealed as far as regarded the penalty. The action in that case, as in this, was for treble damages under the statute of Elizabeth; and the plaintiff stated that the sheriff took a certain sum, *14] which was more than was *allowed by the statutes; and showed what the sums were that the statutes did allow; but the Court, without deciding the main question in the cause, held that the declaration was bad for not showing with sufficient certainty how much was taken lawfully, and how much unlawfully, but merely giving a certain amount in gross.

The declaration in the present case is so drawn as to remove the objection upon which the Court decided the case of *Usher* v. *Walters*: and we are now called upon to decide the question whether the defendant is or is not liable to the penalty given by stat. 29 Eliz. c. 4, notwithstanding the provisions of stat. 7 W. 4 & 1 Vict. c. 55, and the allowance by the Judges of certain additional fees to sheriffs and their officers.

Whilst this case was under consideration, a similar case was pending before the Court of Exchequer, in which they have very lately pronounced judgment. The case is *Pilkington* v. *Cooke*, 16 M. & W. 615; and the question was the very same as that in the case before us. The Court of Exchequer were of opinion that the effect of the statute of 7 W. 4 & 1 Vict. c. 55, upon the statute of 29 Eliz. c. 4, is to exempt the taking of the fees allowed by the Judges under the statute of Victoria from the operation of the penal clause in the statute of Elizabeth, leaving the latter

statute in other respects in full operation: and consequently all that is taken by the sheriff or his officer beyond what is warranted by the exemption given by the statute of Victoria is, if it amounts to more than the poundage, an excess under the statute of Elizabeth, and renders the officer taking such excess liable to an action for the penalty given by that statute.

In this view of the case, which is consistent with the *former decisions, and reconciles the provisions of the statutes, we entirely concur; and our judgment therefore is for the plaintiff. [*15

Judgment for plaintiff.

MARSHALL, Esquire, *v.* HICKS. *Feb.* 2.

In an action of debt by sheriff against execution creditor for poundage, the defendant claimed to set off the expenses, which he had paid, of a bill of sale and appraisement, preparatory to an assignment in trust for the creditors of the party whose goods were seized.

Held that, without further evidence on the defendant's part, the payment in respect of such a sale could not be considered as made for the sheriff, and could not be set off.

DEBT by the sheriff of Cornwall, for 30*l.*, for poundage and sums of money due and owing from defendant to plaintiff for the execution within his bailiwick of divers writs, &c., for defendant, at his request, and for work and labour, journeys and attendances, &c., and on an account stated. Pleas: 1. Except as to 8*l.* 7*s.* 6*d.*, Never indebted. 2. Except as to 8*l.* 7*s.* 6*d.*, a set-off for money lent by defendant to plaintiff, money paid by defendant for the use of plaintiff and at his request, money received by plaintiff for the use of defendant, and on an account stated. 3. As to 8*l.* 7*s.* 6*d.*, a tender. (The claim as to this sum was abandoned.) Issue joined on the replications to the 1st and 2d pleas.

The plaintiff by his particulars of demand claimed 21*l.* 8*s.* for poundage, and other small sums, making up in all 24*l.* 8*s.* (The claim as to the smaller sums was abandoned at the trial.) The particulars of set-off were as follows.

1843, May 19. } Paid William Murray, junior, for and on account of the plaintiff, for an appraisement of the goods and chattels of one Joseph Fiske for the plaintiff, who was then sheriff of the county of Cornwall, preparatory to his (the said plaintiff's) assigning the same, and for the charges attending the execution of the assignment and bill of sale thereof - - - - - - - - £5 5 0

*Paid stamp duty, and parchment for the said assignment and bill of sale - - - - - - £9 3 6 [*16

On the trial, before PLATT, B., at the Cornwall Summer assizes, 1845, it appeared that, in May 1843, a writ was issued by the defendant against one Joseph Fiske, under which the plaintiff, then being sheriff, levied, and assigned the goods to certain parties as trustees for the benefit of Fiske's creditors. The expenses of this assignment, including appraisement and stamp duty, were paid by the attorney for the now

defendant. But there was no evidence of any agreement or arrangement between him and the sheriff; nor did it appear at whose instance this mode of sale was resorted to. It was also stated in evidence that the expense of similar sales was usually borne by the bargainee.

It was contended, for the defendant, that the payment of these sums was in effect a payment on account of the sheriff; and that, as the sheriff could not charge for the expenses of a sale by appraisement and assignment (*Phillips* v. *Viscount Canterbury*, 11 M. & W. 619), he could not lay the expenses of such sale on the execution creditors, but was bound to consider the payment of them as made on his own account. The learned Baron directed a verdict for the plaintiff for 13*l.* 0*s.* 6*d.*, being the difference between the poundage claimed and the 8*l.* 7*s.* 6*d.* tendered, with leave to move to enter a verdict for the defendant, or to reduce the damages if the Court should be of opinion that there was any distinction between the items of the defendant's set-off.

M. Smith, in the ensuing term, obtained a rule nisi accordingly.

*17] *Merivale* now showed cause. Before the enactment of stat. 7 W. 4 & 1 Vict. c. 55, the sheriff was entitled only to poundage under stat. 29 Eliz. c. 4; for expenses of sale he could not make any further charge; *Woodgate* v. *Knatchbull*, 2 T. R. 148. And the fees termed poundage are for the seizure, wholly independent of the sale: for the sheriff is entitled to them although there be a compromise before sale; *Alchin* v. *Wells*, 5 T. R. 470: or although the execution be set aside for irregularity; *Rawstorne* v. *Wilkinson*, 4 M. & S. 256. He was therefore at common law bound to sell without making any charge for the sale. Then the enactment of 7 W. 4 & 1 Vict. c. 55, gave the sheriff certain fees on sales of goods by auction: and he is entitled only to those fees, in addition to his poundage; *Slater* v. *Hames*, 7 M. & W. 413. Accordingly, it was held, in *Phillips* v. *Viscount Canterbury*, 11 M. & W. 619, that, where the sheriff, instead of selling by auction, disposed of the goods, which he had seized, by appraisement and bill of sale, he was not entitled to anything beyond his poundage, and could not deduct the expenses of such appraisement and bill of sale. On the authority of that case the present rule was obtained; and it is now sought to carry its principle so far, as to establish that, where these expenses have been paid by the defendant, who had himself obtained the execution, he is entitled to set them off against the sheriff's poundage by way of deduction. But, to establish this point, it must first be shown that the defendant paid for the sale in question, acting as the sheriff's agent.

*18] The presumption is the other way. If the sheriff had *sold by auction, he would have been entitled to reimburse himself for the expenses of the sale. It is unreasonable, therefore, to suppose that he of his own accord adopted the mode of sale by which he must lose those expenses. If any assumption is to be made, it must be that (as no doubt was the fact) the defendant himself preferred to adopt this mode of sale

It is observable that Lord ABINGER, in his judgment in *Phillips* v. *Viscount Canterbury*, speaks of the want of any provision for the case of a sale by private contract as an omission in the act, and suggests its amendment. If that suggestion had been adopted by the legislature, the sheriff in this case would have been entitled to charge both his poundage and the expenses of sale: whereas it is now sought to deduct his expenses of sale from his poundage. Even if the defendant were entitled to set off the charges for the execution of the bill of sale, he could not, at all events, set off those for the stamp duty and parchment, which ordinarily fall on the purchaser. [COLERIDGE, J. Those charges stand on the same footing as the rest, and cannot be distinguished from them.]

M. Smith, contrà. This was a bill of sale, not to the defendant in this action as purchaser, but to certain other parties, as representing the creditors of Fiske. The now defendant, on whom no part of the expenses of such sale could fall in contemplation of law, paid them. *Phillips* v. *Viscount Canterbury* establishes that the sheriff could not have charged them. The sheriff was therefore the party legally liable to them; and it must be taken that the defendant acted merely as his agent in making the payment. Compelling the defendant to pay them is [*19 in the nature of extortion. The sheriff might have charged if he sold by auction: if he chooses to sell in another way which does not entitle him to charge, does it not lie on him to show that he was guaranteed by private agreement? [WIGHTMAN, J. The defendant not only paid these expenses voluntarily, but, for aught that appears, he fixed the amount: can he make this *ad libitum* deduction from the sheriff's poundage?] The sheriff avoids the risk and trouble of a sale by auction, although he loses the fees. As, then, he is the party on whom the law throws the duty of selling, it is fair to assume that the mode of sale chosen was chosen by him; and, if so, the expense, whatever it may be, beyond what he is entitled to charge, is in reality his own expense, out of whatever hands the money may in the first instance have come; and the now defendant may set it off. Thus, where the sheriff had claimed from an attorney larger fees on a warrant than he was entitled to, and the attorney had paid the charge in ignorance of the law, it was held that, in an action by the sheriff against him, the attorney was entitled to set off the payment; *Dew* v. *Parsons*, 2 B. & Ald. 562.

Lord DENMAN, C. J. The defendant, who seeks to set off these payments, is in the same situation as if he were bringing an action for money paid against the sheriff in respect of them. He has, therefore, to make out his own case. It lies on him to show how he came to make the payments in question. If it were left to be decided as a matter of inference, it is easy to imagine *that the sheriff may have selected this [*20 mode of sale at the defendant's request, thereby depriving himself of the fees which he could have charged on a sale by auction: if so, the

payment was voluntary: and, at all events, it lies on the defendant to make out the contrary.

COLERIDGE, J.(a) I am of the same opinion. I regard it simply as a case of failure of proof: the onus lay on the defendant.

WIGHTMAN, J., concurred. Rule discharged.(b)

(a) PATTESON, J., was absent. (b) Reported by H. Merivale, Esq.

DAMERELL v. PROTHEROE and Others. *Feb.* 3.

A heriot may be due by custom, on the death of a tenant, in respect of a tenement of free lands held in fee simple of a manor.

Consequently, to prove such a custom, presentments of the deaths of tenants of other free tenements held in fee of the manor, and the seizure of heriots thereupon, are admissible.

TROVER. First count, for a gelding colt. Second count, for a cow. Third count, for another cow. Fourth count, for a pony. Fifth count, for a horse. Sixth count, for a mare. Pleas. 1. Not Guilty: 2, 3, 4, 5, 6, 7, to the counts severally, that the plaintiff was not possessed. Issues thereon.

On the trial, before ERLE, J., at the Devonshire summer assizes, 1845, it appeared that the plaintiff claimed to be lord of the manor of South Tawton, otherwise Itton, in the county of Devon: and the action was brought against the defendants, executors of the will of Thomas Palmer Acland, Esq., to recover the value of six heriots, claimed by the plaintiff as having become due on the death of the said T. P. Acland, who

*21] died on the 21st of March, 1844, being then tenant *of six tenements within the said manor, of the names of Trendlebear, Woodland, Amlyn Taw, West Nymph, Taw Green, and Itton.

The tenements in question were lands held in fee of the manor. The plaintiff, having shown that he was lord of the manor, in order to prove that heriots were due on the deaths of owners of these tenements, put in evidence a series of presentments, in which payments of heriots on the deaths of tenants in fee of the manor were specified. Each of the presentments put in regarded several tenements: in each of such presentments, one or more of the tenements in question in this action was mentioned; but each of them related also to other tenements. It was objected, on the part of the defendants, that no proof was given whether the heriots were claimed as heriot custom or heriot service; that, in the former case, no heriot could be due by custom from freehold tenements; in the latter, the right could not be proved by presentments, such evidence being applicable to heriot custom only. It was objected, also, that in any view these presentments were inadmissible, as regarding other tenements besides those in question. The learned Judge overruled these objections, and received the presentments. Verdict for plaintiff.

A rule nisi for a new trial was obtained in the next term, on the ground of the reception of improper evidence.

J. Greenwood now showed cause.(*a*) The question is whether a claim of heriot custom can be made in respect of freehold tenements, within a manor, held in fee *simple. The authorities show that it may. [*22 "An heriot may also appertain to the free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom;" 2 Bl. Com. 424: citing Bracton, 86 *a*, lib. 2, c. 36, s. 9, where the "tenens, liber vel servus," is said to be bound to render an heriot "secundum diversam locorum consuetudinem." To the same effect are 2 Watk. Copyhold, p. 132, *Syliard* v. ——, 1 Bulstr. 101, note (1) on *Lanyon* v. *Carne*, 2 Wms. Saund. 168 *a*, 168 *b* (citing Yearb. Hil. 21 H. 7, fol. 13 A, pl. 15, fol. 15 A, pl. 24, 2 Bro. Abr. *Harriots*, pl. 5), Co. Entr. 613 *a*. No doubt is raised on this point in *Baldwyn* v. *Noaks*, 2 Lutw. 1309, or *Abington* v. *Lipscomb*, 1 Q. B. 776.

Kinglake, Serjt., and *M. Smith*, contrà. This evidence was not receivable, unless the claims can be maintained as for an heriot custom in respect of freehold land, held in fee of a manor. But nothing could render the tenant in fee simple subject to such a render, except an old service, attached to the land before the statute of quia emptores. "Heriots are services and part of the tenure; and since the statute of quia emptores terrarum no tenure can be created or heriots reserved;" *Edwards* v. *Moseley*, Willes, 192, 194. "Where a tenant in fee holds of his lord by heriot service, such service is incident to the tenure, which is ancient, and must be supposed to be before the statute quia emptores;" Suit of Court and Services, 3 Salk. 332, Scriven on Copyhold, 370 (7th ed.). When anything of the nature of a customary render exists in freehold estates, such as a render of minerals in some counties, this is to be ascribed to a peculiar *tenure; Kitchin's [*23 Jurisdictions, &c., p. 267 (5th ed.), tit. *Harriot;* Com. Dig. *Copyhold* (K 19). In the passage in the same work, *Copyhold* (K 23), "So an heriot may be due by the custom of a manor, upon the death of every tenant of an estate of inheritance," it appears, by reference to Kitchin, ut suprà, which is the authority cited, that customary estates of inheritance in copyhold estates only are intended; as in the cases of the various customs specified in Com. Dig. *Copyhold* (C 7), Litt. s. 73. [ERLE, J. May not copyhold land have been enfranchised before the statute quia emptores, to be held of the manor subject to the customs of the manor?] The act of enfranchisement extinguishes the custom; *Doe dem. Reay* v. *Huntington*, 4 East, 271. [ERLE, J. But the authorities which you have cited show that there may be tenants in fee simple of copyholds. The defendants here are only tenants in fee simple of

(*a*) Before Lord DENMAN, C. J., PATTESON and ERLE, Js.

free tenements in a manor. [There is nothing to show how they became so. They may have been copyholders originally.] No copyholds were shown to have existed in this manor. Next, as to the admissibility of the presentments, as comprehending other tenements than those in question: it is not denied that a custom as to one tenement may be proved by evidence of the same custom in another, where the foundation has first been laid by showing that the tenements are all under one uniform tenure: but this is a necessary preliminary; *Rowe* v. *Brenton*, 8 B. & C. 758; *Somerset* v. *France*, 1 Stra. 659; *Marquis of Anglesea* v. *Lord Hatherton*, 10 M. & W. 218;(a) *Stanley* v. *White*, 14 East, 332. *The evidence here is only evidence of reputation, if admissible at all; and therefore only of the custom of the manor; *Chapman* v. *Cowlan*, 13 East, 10; *Morewood* v. *Wood*;(b) *Outram* v. *Morewood*, 14 East, 330 (note), Phil. Evid. 245, 245, 6, (9th ed.); *Harwood* v. *Sims*, Wightw. 112. *Cur. adv. vult.*

*24]

Lord DENMAN, C. J., in the same vacation (February 10th), delivered judgment.

In this action of trover, the right of the plaintiff to take certain beasts for heriots was denied by the plea of Not possessed. The heriots were claimed in respect of free tenements in the manor of South Tawton, held of the lord of the manor in fee simple, of which the tenant had died seised. Evidence was given of the exercise of the right in respect of other tenements within the manor, as well as in respect of the tenements in question, and also of reputation of a custom in the manor for the lord to have a heriot on the death of a free tenant in fee. The defendants objected to the reception of this evidence, on the ground that a right to a heriot in respect of a free tenement held in fee simple must be derived from tenure, and cannot be derived from custom, and that therefore the evidence was inadmissible. The verdict was for the plaintiff; and a rule nisi for a new trial was obtained upon this objection. Several authorities were cited to show that the right to seize a heriot as a service due by tenure cannot be established when the estate in respect of which it is claimed is less than a fee. Authorities also were cited to show that a right to a heriot as a service may be created by *deed, since the statute of quia emptores, 18 E. 1, upon any estate: but the right then is to a render in the nature of rent, which may be enforced by distress or action, but not by seizure of the specific chattel. And it was contended that a heriot could not be due by custom, in respect of a freehold estate in fee simple, because it might be due by tenure. But it is obvious that this consequence does not follow: nor can any argument be drawn against the claim by custom from the reasoning showing that a heriot service cannot be due by tenure upon an estate for life or years created since the statute of quia emptores. Nor has any decision been

*25]

(a) See *Jewison* v. *Dyson*, 9 M. & W. 540, 556.
(b) Note (a) *Doe dem. Didbury* v. *Thomas*, 14 East, 327.

adduced against the legality of heriot by custom in such a case. On the other hand, as a custom may be valid for a heriot upon the death of every free tenant holding for a less estate than fee simple, it follows that it may be valid in respect of free lands held in fee simple, unless there is something in the nature of that estate inconsistent with such a custom, which there is not. The earliest cases on the subject support this view. Fitzherbert, tit. *Prescription*, pl. 29 (13 E. 3): the lord avows for a heriot custom due upon the death of a free tenant in fee; the plaintiff pleads to the avowry a joint tenancy in fee, and that the heriot custom is not due till the death of the survivor. In *Mayne* v. *Cros*, Yearb. Mich. 4 H. 4, fol. 2 B, pl. 6, the right to a fine on alienation of lands held in fee simple, within the honour of Gloucester, was considered valid; which custom is analogous to that in question. And it is mentioned more than once, in the report, that a heriot may be due by custom, in respect of free lands held in fee simple. In Yearb. Hil. 21 H. 7, fol. 15 A, pl. 24, the objection against the prescription for a heriot on the death of every tenant for life (which was a heriot *by custom) was, [*26
that the estate was not continuous, and might not be regranted, and so the custom was not kept up. This was overruled; the validity of the custom was questioned, because the estate was not in fee simple, but not on the ground that the lands were free lands. The objection, therefore, is without foundation: and the rule must be discharged.

Rule discharged.(*a*)

(*a*) Reported by H. Merivale, Esq.

The following case is introduced a little before its proper date, being important in principle, and of great local interest.

ROGERS *v.* BRENTON.

Declaration, in case, stated that plaintiff was possessed of and entitled to a tenement, to wit, the right to dig and take to his own use, tin and tin ore in certain land; and alleged a disturbance by defendant.

Plea, denying the possession and title modo et formâ.

At the trial, plaintiff claimed under the following custom, which the jury found to exist in fact:—Any person may enter on the waste land of another in Cornwall, and mark out by four corner boundaries a certain area: a written description of the plot of land so marked, with metes and bounds and the name of the person for whose use the proceeding is taken, is recorded in an immemorial local court, called the Stannary Court, and proclaimed at three successive courts held at stated intervals: if no objection is successfully made by any other person, the Court awards a writ to the bailiff of the Court to deliver possession of the said "bounds or tin work" to the bounder, who thereupon has the exclusive right to search for, dig, and take for his own use all tin and tin ore within the described limits, paying to the landowner a certain customary proportion of the ore raised, under the name of toll tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain.

Held:

That the custom to preserve the right by the mere ceremony of an annual renewal without working is unreasonable and bad in law, and that plaintiff (who had ceased to work or

pay toll for 18 years) could not recover in the above action, even as against a stranger: And

That, although the alleged custom involved a claim of a profit in alieno solo, it would have been a good one, if bonâ fide working had been found to be obligatory under it.

CASE. The first count stated that the plaintiff was lawfully possessed of and entitled to and ought to have had and enjoyed the tenement *27] following: that is *to say, the right and liberty to dig, get, raise and carry away, for his own use, the tin and tin ore found and being within a piece of ground called the Ruby Tin Bounds, in the parish of Wendron in the county of Cornwall; yet defendant, well knowing the premises, but intending to deprive plaintiff of the benefit of the tin, &c., and to disturb him in the possession and enjoyment of his said right and liberty, and to render it of less value, wrongfully dug, got, raised and carried away large quantities of the tin and tin ore found within the said piece of ground; whereby plaintiff was deprived of the benefit which he might and otherwise would have derived from his said right and liberty, and the said tenement thereby became of less value to plaintiff than it otherwise would have been. The second count was in trover, for tin and tin ore.

Pleas. 1. Not guilty. 2. As to the first count, that plaintiff was not lawfully possessed of, or entitled to, nor ought to have had or enjoyed, the said tenement, that is to say, the right and liberty to dig, &c., in manner and form, &c. Conclusion to the country. Issue thereon. 3. To the second count, traverse of the possession of the tin and tin ore. Issue thereon.

The cause was tried before WIGHTMAN, J., at the Middlesex(*a*) sittings, after Trinity term, 1843, when the jury found a general verdict for the plaintiff, subject to a motion for a nonsuit. It appeared that the plaintiff, who was lord of the manor of Helston in Kerrier by purchase from the Duchy of Cornwall in 1798, claimed the tin and tin ore within the tenement of Galidna, formerly a conventionary or customary tenement *28] of that manor, but enfranchised by the plaintiff since the *purchase. On the sale of the manor all mines were reserved to the Duchy; but the plaintiff claimed as "bounder," that is as owner of a "pair of tin bounds," called Ruby Bounds, by force of the custom of Cornwall, described in the Appendix to the report of *Rowe* v. *Brenton*,(*b*) and in the presentments of the Stannary Convocation or Parliament.(*c*) The plaintiff derived

(*a*) The venue was altered from Cornwall to Middlesex by a Judge's order, in November 1841.

(*b*) 3 Man. & Ry. 497, 498. Appendix F. The custom is fully stated in the marginal abstract of the present case, antè, p. 26.

(*c*) The following are the parts of the Stannary Convocation roll read at the trial: on the argument in banc, counsel referred to the whole of the printed copy.

Convocation, 22 Jas. 1, article 17. We find, according to our ancient customs, that every tinner that shall new cut any old bounds, shall, at the next Court within the Stannary where the work is, enter his proclamation for the same, and therein nominate all his owners, and the day of his pitch, and the names, both old and new, of the said work, with the bounds and

title to them as executor and legatee of his father. The tin bounds had not been cut or pitched within living memory; nor was there any evidence of their *commencement; but proof was given of the annual renewal of them for seventy years past. Tin [*29 [*30

limits of the said pitch; otherwise the said pitch to be deemed void. Printed ed. (Truro, 1824), p. 19.

Art. 18. We find, when bounds are kept by renewing according to the custom, and the keeper shall carelessly let slip his day of renewing, and shall afterwards come again and renew the old corners before any other tinner shall cut a new pitch upon them, that such renewing shall be taken for a good renewing against any other pitch. Ib. p. 20.

Convocation, 12 Charles 1, art. 3. We present and affirm that, by common prescribed Stannary right, any tinner may bound any wastrel lands within the county of Cornwall, that is unbounded or void of lawful bounds, and also any several and inclosed land, that hath been anciently bounded and assured for wastrel by delivering of toll tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the Prince's several and inclosed customary land within the ancient Duchy assessionable manors, as hath been anciently bounded with turfs according to the ancient custom and usage within the said several Duchy manors, and not otherwise, the tinner paying out of such land so bounded the usual toll only as is generally paid within the Stannaries; that is, the fifteenth dish or part, saving in such places where a special custom hath limited another rate of toll. Ib. p. 34.

Art. 4. We present and affirm our general custom of gaining and keeping right in bounds to be by new pitch and renew in such manner as it now is and anciently hath been in use in the several Stannaries, which said general custom we limit, ordain, and agree that it shall be thus understood, viz., that an owner working his tin work by himself, his wages-man, or farmer, paying toll once a year and a day, or otherwise continuing his working without fraud in driving an adit unto, or sinking a shaft upon, the said work, and withal preserving the four corner bounds so as they [may] be seen or sufficiently proved if they, or any of them, shall be newly or casually or maliciously defaced, so long the said owner shall not lose his bounds for default of renewing. Ib. pp. 34, 35.

Art. 31. We agree, constitute, and ordain, that if any tin work under bounds hath lain or shall lie unwrought by the space of seven years, and if any tinner shall be desirous to work the same, he shall signify such his purpose to the owners of the said work, or to the most of them, and shall cause to be entered of record upon the Court book the place where the said work lieth, and the time of such his declaration, to whom and before whom; and then if the owners of the said work, or some of them, shall not work, set, or procure the said work to be wrought within one year next after such declaration made unto them, if the owners have not any other work then in working by their own adventure, it shall be lawful for the said person that gave such warning to the owners to work the said work at farm, as long as he will continue his costs therein, paying to the owner, if it be [a] dry work, the seventh dish to farm; and if it be a water work, that draweth water both summer and winter, but the ninth dish to farm. Provided, that before he enter into the work he shall give sufficient caution, such as the steward of the Stannary Court shall allow, for the well [and] orderly working and preservation of the said work, and that he shall not break the pillars, backs, vaults, or binding thereof, nor fill the adit thereof to the prejudice or destruction of the said work. But for tin works in several lands unbounded, which belong to the lords of the soil only, we affirm and say, that by our custom no tinner may work in several or unbounded lands without the leave of the lord or owner of the soil. Ib. pp. 47, 48.

Convocation, 2 Jac. 2, art 2. Item. We present our ancient custom to be, and do agree, constitute, and ordain that all tin bounds ought to have four corners, which shall consist of twenty-four turfs or stones, six to each corner. And we likewise find that side bounds have been anciently used and are still lawful to be used. And we do declare our custom to be, that all bounds must be renewed within a year and a day, and that side bounds shall likewise be so renewed whereof the benefit shall be claimed. And we do further declare our custom to be, that in case the side bounds be unrenewed and left void, and the head or corner bounds be renewed, the benefit of the side bounds only shall be lost as to the land that they draw; but the land within the head or corner bounds shall remain well bounded. Ib. p. 57.

Art. 4. Item. We do agree our custom to be, and accordingly constitute and ordain, that rights and titles to bounds, and rights and titles to adventures to work for tin shall be in the owners in the nature of chattels real, but shall be perpetually enjoyed from executor to executor or administrator, being renewed and continued according to custom, and shall be executory

had been found and raised in small quantities by adventurers under the bound-owners and the customary toll paid to the lord at various periods, about 60, 50, 44 and 40 years ago. The last receipt of toll from the Ruby Bounds was in 1823, about 18 years before the commencement of the action. The defendant was the agent or captain of a company of adventurers who had been working for several years within or near the Ruby Bounds, but had only raised tin ore shortly before the action. *31] They *refused to pay any dues to the plaintiff, or to recognise his title as bound-owner. It did not appear under whom the company claimed.(*a*) The following were the most material heads of evidence produced by the plaintiff. The roll of the Stannary Convocations or Parliaments, held 22 James 1, 1 Charles 1, 12 Charles 1, 2 James 2, and 26 G. 2, which last recited the acts of the previous Convocations. The particular entries read were articles 17 & 18 of 22 James 1;(*b*) arts. 3, 4, and 31 of 12 Charles 1;(*c*) arts. 2 & 4 of 2 James 2;(*d*) and part of art. 8, sect. 1, of 26 G. 2.(*e*) These were put in as declarations of the custom. One of them, namely, art. 31 of 12 Charles 1, was objected to by Sir *W. W. Follett*, counsel for the defendant, as containing a new enactment and not a mere declaration; but the learned Judge said he was unable to distinguish what was new law from what was old custom, and admitted the whole entry in evidence. The Commissions, under which the Convocations 2 James 2 and 26 G. 2 were held, were also proved, none earlier being found.(*g*) They showed that the Convocation professed to make new laws as well as presented old customs. A

assets, subject to the payment of debts and legacies in such order and manner as other goods and chattels are by the rule of the common law; but may be granted by deed or devised by will. Ib. p. 58.

Convocation, 26 G. 2, art. 8, sect. 1. Whereas by the common usage and custom of the Stannaries, any tinner may bound with tin bounds any wastrel lands within the county of Cornwall that are unbounded or void of lawful bounds; and also any several and inclosed lands that have been anciently bounded and assured for wastrel by payment of toll tin before that the hedges were made upon the same, and also may cut bounds in the Prince's several and inclosed ancient assessionable Duchy manors, according to the ancient custom and usage within the said several Duchy manors; the tinners so bounding the said lands paying the usual toll to the lord of the soil as is generally paid within the Stannaries (that is to say) a fifteenth dish or part, saving in such places where a special custom hath limited another manner of toll: And whereas, there are several ancient and laudable customs relating to the manner of cutting, renewing, and working of tin bounds; be it hereby declared and enacted that all such customs shall remain and be in force, unless they are hereinafter particularly limited and restrained. [The rest of the article was not read.] Ib. p. 89.

It will be observed that art. 31 of the Convoc. 12 Car. 1, authorises an entry on unworked bounds at the end of seven years. If this is taken as part of the custom, and not as new law, it makes it more reasonable. The judgment first delivered turned upon the language of this article. See post, p. 46.

(*a*) It was stated, on the motion for a new trial, that the defendant claimed under a sett from a lessee of the Duchy. The fact was so; but it was not shown on the trial, nor admitted by the plaintiff; the legal effect of the lease and sett being questioned.

(*b*) Printed ed. 1824, pp. 19, 20; antè, p. 28, n. (*b*).

(*c*) Id. pp. 34, 47; antè, p. 28, 29, n. (*b*).

(*d*) Id. p. 57; antè, p. 29, 30, n.(*b*).

(*e*) Id. p. 89; antè, p. 30, n. (*b*).

(*g*) The last commission is printed in Appendix F to *Rowe* v. *Brenton*, 3 Man. & Ry. 497.

charter of 23 Hen. 7 was put in, which, among other things, recognised bounders (bundatores) as being the possessors of tin works (opera stanni) and their obligation to enter the description of newly *bounded works in the Stannary Court.(a) Certain extracts from the Court rolls of the Stewards of the four Stannaries in the reigns of Hen. 6, Hen. 7, Elizabeth and James 1, were read to show the early existence of tin bounds, or "opera stannaria," proclamations of them in the Stannary Court, and presentments of the custom generally.(b) Ministers' accounts, rendered to the Crown by officers of the Duchy in 25 & 29 Ed. 1, 28 Ed. 3, 7 & 8 Hen. 7, 21 & 22 Hen. 7, 22 & 23 H. 7, were produced to show the receipt by the lord of the manor of "toll tin" from tin works, the toll tin being explained to mean the customary due payable to the freeholder out of bounded tin mines. Leases by the Crown and Duchy of "toll tin" belonging to the Duchy, and also of "tin mines" in inclosed land, were read from the Appendix (No. 55) to Concanen's Report of *Rowe* v. *Brenton*, p. 205.(c) The assession roll, 2 Ric. 2, and the answer of tenants to interrogatories at an assession court held for the manor of Helston in Kerrier, in 1619, were produced to show the existence of bounded tin mines rendering toll to the lord in that manor. [*32

The parol evidence was given chiefly by mine agents, solicitors, land agents, and old tollers, *i. e.* persons employed to renew bounds and collect tells. They spoke of the general prevalence of the custom in different parts of Cornwall, the large receipts of dues by owners *of tin bounds, and the extent to which they were made the subject of sale, devise, and settlement. The customary amount of toll, namely, $\frac{1}{13}$th, was sometimes varied by agreement. They all agreed that, after being legally set on foot, the bounds could be preserved by mere annual renewal of the turfs or mounds at the corners; and they did not speak of the mounds as consisting of any particular number of turfs. Some of the witnesses doubted whether even this ceremony was strictly necessary, except as evidence of the right. They also differed as to the consequence of neglecting to renew on the exact day. None could assign any limit to the surface of land that might be included in the four corners; but it was said to be generally of very small dimensions. One of the most experienced witnesses remembered a pair of tin bounds "a quarter of a mile each way;" but this was the largest he knew of. Only one instance of newly proclaimed bounds was recollected by any witness, all the wastes of the tin mining districts being supposed to be already under ancient bounds. [*33

(a) The original is on the Patent roll, and is printed in the Appendix to *Vice* v. *Thomas*, p. 31, (Smirke's Report, London, 1843.) See also a partial translation in Appendix, 3 Man. & Ry. 494.

(b) Most of these are in the Appendix to *Vice* v. *Thomas*, pp. 59, 60, 61, 62, 66, 68, 72, 73 and 74. The Stannary Courts are noticed in 4 Inst. 229, 231, and recognised by stat. 6 & 7 W. 4, c. 106, and other acts.

(c) Ed. London, 1830. Some, not there found, were produced from the public records.

No evidence was offered on the part of the defendant: but his counsel contended that the custom did not support the declaration; that it was bad, unless it implied the necessity of working; that the documentary evidence was all consistent with a custom so qualified, and that the parol evidence was vague and self-contradictory.

WIGHTMAN, J., after commenting on the proofs, told the jury that the reasonableness of the custom could be considered by them only as an element in forming their opinion whether it existed in fact: that, if working was essential to the custom, they should find for the defendant; but,
*84] if the custom was that bounds duly *proclaimed and renewed gave an exclusive right to the tin, then they should find for the plaintiff.

In Michaelmas term following, Sir *W. W. Follett* obtained a rule nisi to set aside the verdict and enter a nonsuit, or for a new trial, or to arrest judgment, on the following among other grounds. That the proof was not of an absolute right as stated in the first count, but of a qualified right, subject to payment of toll tin to the lord:(*a*) that the action was misconceived in form, and the cause of action ill stated in the first count, which asserted a right to take tin ore without alleging any disturbance in the actual exercise of it, or stating it to be an exclusive right: that the alleged custom was not proved, for that the witnesses varied in their statement of it, some alleging that even annual renewal was unnecessary, and the evidence left it uncertain whether a corner bound of six turfs, or of one turf, or any, at each corner, was necessary: that some of the presentments seemed to show that working was necessary in order to keep up the right: that the toll taken had varied: that there was no satisfactory evidence of any working by bound owners adversely to the landowner: that one of the presentments of the Stannary Convocation, 12 Car. 1, namely art. 31, was improperly admitted as evidence of the custom, which was, in fact, there mixed up with a new law or regulation, and was left to the jury without pointing out to them the distinction; and that the custom, as claimed, was, at all events, bad in law, as being a custom to take a profit in alieno solo, undefined and unreasonable, and tending rather to prevent the working of mines than to encourage it.

*The argument on all the points except the last is omitted.
*35] *Kelly*, *Smirke* and *Montague Smith* showed cause.(*b*) The custom proved and found by the jury supports the verdict either on one or the other count. If the property in tin bounds be incorporeal, and in the nature of a profit à prendre, then the plaintiff is entitled to recover on the first count, which might perhaps have been specially demurred to for uncertainty, but is sufficient after verdict. If the custom gives to the owners the exclusive property in the tin mines included in the bounds, then the count in trover for the ore is supported. It is there-

(*a*) Leave for the Court above to amend, if necessary, was reserved at the trial.

(*b*) The case was argued on January 23d, 1845, before Lord DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, Js.; and December 8th, 1845, before Lord DENMAN, C. J., PATTESON and WIGHTMAN, Js. PATTESON, J., left the Court during the argument on the latter day.

fore immaterial to the plaintiff whether his right be corporeal or incorporeal: and the only question is, whether the custom can be maintained in point of law.

It is contended, for the defendant, that this is in substance a claim of a profit in the soil of another, not as appurtenant to land or as belonging to a definite body of persons so as to be capable of being released, but as existing by custom, and capable of being exercised by any one: and the custom is alleged to be bad on the authority of *Gateward's Case*, 6 Rep. 59 *b*; *Selby* v. *Robinson*, 2 T. R. 758; *Grimstead* v. *Marlow*, 4 T. R. 717, and *Blewett* v. *Tregonning*, 3 A. & E. 554. But those cases are distinguishable. *Gateward's Case* shows only that the law does not recognise a right of common founded on custom, except in the single *instance of copyholders. In *Selby* v. *Robinson* the right was alleged to be in poor householders, and was held too vague. *Grimstead* v. *Marlow* was also a case of common claimed by inhabitants. The judgment of LITTLEDALE, J., in *Blewett* v. *Tregonning*, which was the case of a custom to take sand, shows that the decision turned on the unreasonableness of subjecting the soil of one man to a destructive easement for the mere private benefit of another: and in none of these cases was any benefit or compensation derived from the custom by the owner of the soil and freehold. But the owner of land subject to tin bounds is entitled to receive toll, generally one-fifteenth, as in the manor of Helston in Kerrier, of the gross produce of the mine; a charge so considerable that few landowners would object to their mines being worked on such terms. That a benefit to the landowner may make good a custom injurious to his inheritance is a doctrine laid down in the case of the Droitwich boilaries; *Smith* v. *Barrett*, 1 Siderf. 161; and supported by *Tyson* v. *Smith*,(*a*) where a custom to break ground in the land of another for setting up stalls, on paying a fixed compensation, was held good.

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But the rule in *Gateward's Case* is too narrow a test to be applicable to customs extending over large tracts and divisions of the kingdom, and founded on notions of general policy or public advantage. A custom may be bad for a vill which would be good for a district of many vills; Yearb. Mich. 43 Ed. 3, f. 32 A, pl. 30, cited in Fitz. Ab. *Custome*, 224 *b*, pl. 15; or in a great fee or borough, Lib. Assis. 40 Ed. 3, f. 250 A, pl. 41, 45 *Ed. 3, f. 229 A, pl. 8; though not in an upland town; Co. Litt. 110 *b*. A like distinction is recognised in Yearb. Pasch. 21 Ed. 4, f. 28 B, pl. 23, cited in *Beresford* v. *Bacon*, 2 Lutw. 1317, 1319. So, a custom de non decimando may legally be claimed over a county or large district, though not within a manor or small precinct; 1 Rol. Ab. 653, 654, tit. *Dismes* (H), pl. 8 to 13; *Johnson* v. *Bois*, 1 Gwill. 373; Doctor and Student, 287 (ed. 1815), Dial. 2, cap. 55: and the reason seems to be that a custom in derogation of common right,

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(*a*) 6 A. & E. 745; affirmed on Error, *Tyson* v. *Smith*, 9 A. & E. 406. See p. 425.

affecting great numbers of people, can hardly be supposed to have grown up without some good ground and legal origin; whereas a similar usage prevailing over a manor or limited district may be reasonably referred to usurpation on the one part, and submission to force or fraud on the other.

So, reasons of local policy will support some customs: thus the defence of the marches of the realm gave origin to the peculiar tenant-right of the northern counties; *Newton* v. *Shafto*, 1 Siderf. 267; *Davenant* v. *Hurdis*, Moor. 576, 588. The custom of Lynn, to take ballast for ships, mentioned in *The Mayor and Commonalty of Lynn Regis* v. *Taylor*, 3 Lev. 160, and the customary common rights alleged to exist in the fen countries, in *Weekly* v. *Wildman*, 1 Ld. Raym. 405, 407, are also referred to the same principle. So, the custom of gavelkind in Kent, though derogating from the common law right of primogeniture; and the custom of London authorising the elevation of old walls to a height that may obstruct a neighbour's light to the injury of his inheritance. Two of the most remarkable examples of customs infringing on the com-

*38] mon right of the *subject to the profits of his own mines have subsisted immemorially, and without question, in Cornwall itself. Until the recent abolition of the coinage duty by stat. 1 & 2 Vict. c. 120, the Prince received, jure ducatûs, a duty of 4*s.* per cwt. on all the tin smelted in Cornwall, which could not be exported from the county until it had been brought to be examined and stamped at certain coinage halls appointed by him. The existence of this customary payment can be traced to the earliest period of which there is any public record.(*a*) The right, also, of pre-emption of all tin in the county can be shown to have been exercised for centuries, and was upheld in the *Case of The Stannaries*, 12 Rep. 9,(*b*) where it is expressly called a "profit à prender."(*c*) Customs analogous to that of tin-bounding also prevail in other counties. The rights of the free miners of the forest of Dean are recognised and regulated by stat. 1 & 2 Vict. c. 43, and have come under discussion in the Courts, in *Doe dem. Thomson* v. *Pearce*, 2 Peake, N. P. C. 242, and *Morse* v. *James*.(*d*) Those of the Derbyshire lead mines also strongly resemble the Cornish custom, and appear to be firmly established ever

*39] since an inquisition of 16 Ed. 1;(*e*) *Gilbert* v. *Tomison*, 4 Dowl. & Ry. 222, *Arkwright* v. *Cantrell*, 7 A. & E. 565, *Beresford* v. **Bacon*,

(*a*) See the record 9 R. 1, and the other authorities cited in the Appendix to *Vice* v. *Thomas*, pp. 1, 9, 11, 16, 89.

(*b*) See also the petitions, 21 Ed. 3, in 2 Rot. Parl. f. 168, No. 27; f. 180, No. 20; and stat. 12 Car. 2, c. 24, s. 14.

(*c*) The prerogative of pre-emption was enforced as late as the last century. The price and terms were usually settled by negotiation between the Crown or Prince on the one side, and the tinners, represented by the Stannary Parliaments, on the other; and the farmers of the prerogative were usually bound by covenants to take all the tin on those terms, *Vice* v. *Thomas*, Appendix, pp. 16, 17, 18, 37, 42, 91.

(*d*) Willes, 122; see an early presentment, Appendix to *Vice* v. *Thomas*, p. 128. See also *Regina* v. *Harris*, 11 A. & E. 518.

(*e*) *Vice* v. *Thomas*, App. p. 123.

2 Lutw. 1317.(*a*) In the last case the custom itself, as alleged, was held bad only upon formal defects, and because it was ill pleaded as confined to a single parcel of land. The custom as claimed in Cornwall fulfils all the three conditions of a good custom, as laid down in *Cudden* v. *Estwick*, 6 Mod. 124; for the party bound has a benefit, the party claiming is at some charge, and the usage may have a reasonable commencement. Nor has it prevailed sub silentio, and by mere acquiescence in pais. It was before the Court in *Crease* v. *Barrett*, 1 C. M. & R. 919, S. C. 5 Tyr. 458, *Regina* v. *Crease*, 11 A. & E. 677, *Crease* v. *Sawle*, 2 Q. B. 862, *Doe dem. Earl of Falmouth* v. *Alderson*,(*b*) and *Rowe* v. *Brenton*,(*c*) and was admitted in its fullest extent in *Vice* v. *Thomas*,(*d*) determined by the Lord Warden of the Stannaries with the advice of five judicial members of the Privy Council.

These authorities are sufficient to show that the doctrine of *Gateward's Case*, 6 Rep. 59 *b*, is inapplicable to customs of this sort, which are the lex loci of a province, and not mere manorial customs. But it will be contended that, although a custom to work mines in the land of another, which the owner will not work himself, may be sustained on public grounds, the custom as here asserted is to appropriate mines without any obligation *to work at all; and that the custom in this form has no other operation than to change the property without securing to the community any benefit from it. This is the most plausible objection to the claim, but does not leave it without strong ground of support. Cornwall has, for many centuries, been a constituent part of the realm; but its ancient relation to and connection with England was rather that of Wales or Scotland than of an English county. It probably had its own usages and laws, differing widely from the common law, of which its remarkable mining customs may be the vestiges.(*e*) In *Doe dem. Earl of Falmouth* v. *Alderson*,(*g*) PARKE, B., treats the custom of bounding as one not governed by ordinary rules, but rather as a sort of "common law of Cornwall." Now, if it had been the immemorial custom in that county that the owner of the land had no legal right whatever to the mines, but was obliged to suffer any person to enter and work them who should be selected by the Crown or the Lord Warden or other public officer, and to content himself with either a share in the

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(*a*) Some unreported cases are mentioned in Bainbridge on Mines, 453, 463, ch. 12, § 1. Lord DENMAN, C. J., observed, during the argument, that in the mining districts of Derbyshire a right was also asserted to acquire an exclusive property in mines by fictitious *stowses* without working them. See Bainbridge, p. 465.

(*b*) Report of *Vice* v. *Thomas* (see p. 32, note (*a*), antè), p. 39.

(*c*) 3 Man. & Ry. 133, 213, 497. (Appendix F), and *Concanen's* report of the same case, pp. 80, 81. S. C., but the documentary and other evidence stated shortly, and with reference only to the points of law decided, 8 B. & C. 737.

(*d*) P. 32, note (*a*), antè.

(*e*) Examples of customs peculiar to Cornwall occur in Yearb. Mich. 14 H. 4, f. 5 A, B, pl. 6; Bracton, 271 *a*, Lib. 4, Tr. 3, c. 13, s. 2 (ed. 1569); and in *Chapman* v. *Chapman*, March's Rep. 54, pl. 82.

(*g*) Report of *Vice* v. *Thomas*, p. 40.

adventure or compensation for damage, such a custom would have exactly represented the state of the law in almost every country in Europe, except the British Isles,(*a*) and in many countries beyond the limits of Europe; and this has been a law, not merely transmitted to those countries from early or barbarous ages, but, in some instances, as in France, deliberately engrafted on their jurisprudence by modern legislation. *Would it then have been possible for the Courts to condemn that custom as absolutely unreasonable in itself, which the rest of Europe prefers to the common law of England? Yet the custom of bounding stops far short of such a law as is here supposed. It only gives to a stranger a right to the tin ore after due notice to the lord of his intention to cut the bounds, of which a description with defined boundaries is entered of record. Persons are invited to oppose the claim by public proclamation in the Stannary Courts; and possession is finally awarded by a writ of possession. The records of the Steward's Courts show this, and how the claim may be opposed.(*b*) It is true that the entries read at the trial did not clearly show any instance of opposition *by the landowner:* in fact, all tin bounds in existence are now so old that the practice has ceased to be familiar; but it cannot be doubted that the claim would be defeated by showing either that the owner himself was working or was about to work, or that the bounder had inclosed an unreasonable extent of land, larger than would be taken by any bonâ fide adventurer. Then, too, the land must be either wastrel, *i. e.* land actually uncultivated, or else inclosed land "anciently bounded and assured for wastrel by delivering of toll tin to the lord of the soil before that the hedges were made;" Convocation, 12 Car. 1, art. 3.(*c*) Hence the landowner is protected from a vexatious invasion of his property; and the only *question is, whether he is willing to work his own tin mines, or to let the property in those mines, which lie in waste land, pass to another, subject to the payment of the lord's share whenever they are worked.

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But it is said that, without an obligation to work, the custom is liable to be abused by those who may buy up bounds for the mere purpose of preventing new mines from being opened to the detriment or depreciation of older workings elsewhere. This is possible: but the policy of a law, whether local or general, is justified by its tendency in ordinary cases. *Ad ea quæ frequentius accidunt jura adaptantur.* It is far more likely that tin bounds will be cut by those who intend, sooner or later, to work; and it is certain that the owner of a mine, who has no interest in the surface, is more likely to open it than one who is interested in both, and

(*a*) See the proofs of this in the Appendix to *Vice* v. *Thomas*, pp. 80—86; and Delebecque, Législation des Mines, &c., Bruxelles, 1838.

(*b* The entry referred to sets forth the bounds entered by R. Rawlyn, 7th July, 1613, which appear to be claimed by a new bounder, as "void for want of renewing." The entry concludes: "Negatur per W. Corinton. ar^{r}. et ipse narrat, et defendens condemnatur. Et judicium versus bundatorem." Appendix to *Vice* v. *Thomas*, p. 74.

(*c*) Ante, p. 28, n. (*b*).

who cannot derive profit from one without sacrificing the other. In *Vice* v. *Thomas*(*a*) the working by the bound-owner had been discontinued for seven years; yet the Court entertained no doubt that his interest still subsisted, no ground of forfeiture being specifically shown, and that possession of the mine might be recovered by ejectment.

To disallow the custom on the ground that mere renewal without working is insufficient, will be equivalent to destroying this species of property altogether; for the custom is entire. The custom proved to exist is unqualified except by the condition of annual renewal, and, though the whole of the wastrel of Cornwall is *said to be under bounds, there [*43 are certainly none in which continuous working can be shown. When the demand for tin, or the price of it, falls, the adventure is suspended; and, if renewal of the four corners is not enough to testify the animus revertendi, the mine must lapse to the lord without any act done by him to recover possession and without even notice of his intention to retake it. The effect of such a decision will be attended with serious inconvenience and injury. After long acquiescence of the Crown, the Prince, and the landowners of Cornwall, by all of whom the custom is shown to have been constantly recognised, it is now too late to question its validity or its original reason. "A custom once reasonable and tolerable, if after it become grievous, and not answerable to the reason whereupon it was grounded, yet is to be" "taken away by act of parliament;" 2 Inst. 664; and in *Hix* v. *Gardiner*, 2 Bulstr. 195, 196, COKE, C. J., lays down the same rule of caution against pressing too closely an inquiry into the reason of an ancient custom.

Sir *T. Wilde* (with whom were *Crowder* and *Butt*), contrà. The custom, as proved, is uncertain and unreasonable. The usage ought to be clearly defined in order to establish a right of this kind, whereas here it is left in uncertainty as to the necessity of renewal; the times at which the renewal, if necessary, is to be made; the mode of bounding; and the extent of the bounds. No doubt some custom does exist: and it might reasonably originate in the willingness of a landowner to permit adventurers to work mines in his waste on payment of dues. This is the custom as stated in the declaration *in *Crease* v. *Barrett*, 1 C. M. [*44 & R. 919; S. C. 5 Tyr. 458. But the custom now claimed is to turn up four corners in another man's land, including an area of any extent, and thereby to devest the whole property in the tin mines out of the landlord without any reasonable security that he will ever be permitted to receive the dues, or the public derive any benefit from the transfer of property. In *Broadbent* v. *Wilks*, Willes, 360,(*b*) and *Hilton* v. *Earl Granville*, 5 Q. B. 701, mining customs affecting the enjoyment of the land in a much less degree were held bad. No custom at all

(*a*) Antè, p. 32, note (*a*). The judgment of the Vice-warden (Dampier), which was the subject of appeal, enters very fully into the facts of the case, and shows the view taken of the nature of the custom by the local officers of the Duchy. Pp. 7—14.

(*b*) Judgment affirmed on Error; *Wilkes* v. *Broadbent*, 1 Wils. 63.

resembling this has been shown to exist; and the large extent of the district subject to it only makes it more objectionable. The customs of Dean Forest were declared and regulated by Parliament because they were vague before; yet there the right was always confined to a certain class of persons; and an officer of the Crown, which was the original proprietor of the whole forest, was a party to each grant of the liberty.(*a*) So of the Derbyshire customs: the meer or sett granted is of small and fixed dimensions; and the barmaster, who there also represents the owner of the mines, makes the grant; and the custom of the district requires that the mine should be really worked, otherwise it may be re-granted; *Arkwright* v. *Cantrell*, 7 A. & E. 565.(*b*) The customs of descent in the northern manors were adapted to a country bordering on a hostile nation, for they provided for the defence of the realm by preventing the subdivision of estates and by favouring
*45] *the devolution of the land to males.(*c*) So, the custom of gavelkind is only the relic of a state of law which is supposed to have once prevailed over the rest of England. As to the compensation by payment of toll to the lord, how is he to exact it, if the bounder refuses to work? The presentments of the Stannary Convocation confine the custom to *tinners*, 12 Car. 1, art. 3;(*d*) but who are tinners within it? Is the working tinner, who alone is entitled to some of the privileges of the Tinners' charters,(*e*) to have the sole benefit of the custom? Is any adventurer to be called a tinner for this purpose; or does any one, who cuts four turfs, and claims the tin within them, by that act alone become a tinner? The parol evidence goes to that extent: but the written presentments speak only of the "tinner," and call the tin bound a "pitch," which is the current term for the portion of a mine taken by a miner who contracts to raise the ore; Convocation, 22 Jac. 1, arts. 17, 18; and 12 Car. 1, art. 4, antè, p. 28, n. (*b*). No satisfactory proof has been offered that the custom admits the landowner to contest even the original cutting of the bounds, though it may be opposed by a prior bounder, as the wastrel must be "void of lawful bounds." The only way of obliging the bounder to work is pointed out by the law of Convocation, 12 Car. 1, art. 31, antè, p. 29, n. (*b*), which is evidently a newly enacted remedy. As to the cases (*g*) relied upon as authorities for the custom, those on the rateability of toll tin decide nothing as to the title of bounders. The
*46] person in *receipt of the toll, or a specific share of the tin ore, has been held liable to rates: but this Court has had no question reserved as to the validity of the usage under which the toll or share was

(*a*) See Sopwith's Preliminary Observations on The Award of the Dean Forest Mining Commissioners, London, 1841.

(*b*) The custom is set out in pp. 572, 573.

(*c*) *Newton* v. *Shafto*, 1 Lev. 172.

(*d*) See antè, p. 28, n. (*b*); also Convocation, 26 G. 2, cited antè, p. 30, n. (*b*).

(*e*) 4 Inst. 233, 234, also Convocation, 22 Jas. 1, arts. 12, 14, 15, 16.

(*g*) See *Crease* v. *Sawle*, 2 Q. B. 862, and the cases cited antè, p. 39.

received. The *fact* of receipt was admitted; and the nature of the lord's interest was alone discussed. Some extrajudicial dicta in *Doe dem. Earl of Falmouth* v. *Alderson*,(*a*) have been cited: but the verdict there negatived the existence of the alleged tin bounds; and the judgment eventually turned on that fact. The effect of the decision in *Vice* v. *Thomas*,(*b*) has also been misapprehended. The bounds were there treated as a mine, as they were in *Doe dem. Earl of Falmouth* v. *Alderson*, 1 M. & W. 210; S. C. Tyr. & G. 543; they had been actually worked and never relinquished; and, when the owner sought to recover possession of them by a bill or petition in equity, the answer of the Court of the Lord Warden was that, if the petitioner had a right of possession, he had his remedy at common law. The exact nature of the bounder's interest was quite immaterial to the decision of that case.

The further hearing of the case was adjourned.

Lord DENMAN, C. J., in Hilary vacation 1846 (February 14th), said that the Court, without further argument, would make the rule absolute for a new trial, on the ground that the entry in the Convocation roll, 12 Car. 1, art. 31, had been left to the jury as evidence of the custom without sufficient direction to distinguish between the enacting and the declaratory effect which might be ascribed to the by-law contained in it.

After this judgment, *Crowder* and *Butt*, who had not *been heard, requested that they might argue in support of that part of the rule which claimed a nonsuit for the invalidity of the custom. But the cause stood over, without further argument, till Trinity vacation, 1847. [*47

Cur. adv. vult.

Lord DENMAN, C. J., in Trinity vacation (July 7th, 1847), delivered the judgment of the Court.

The remaining question in this case, which the Court is now called on to decide, turns upon the validity of a custom or local usage, on which the plaintiff must rely to establish the most important allegation in his declaration, which the defendant expressly traverses by one of his pleas. The plaintiff declares on his possession of a tenement, which he describes as being the right and liberty to dig, get, raise and carry away the tin and tin ore, found and being within a certain place or plot of ground called the Ruby Tin Bounds; the second plea denies this; and, in part proof of it, the plaintiff has offered evidence of, and the jury have found the existence in fact of, the following custom: that any tinner within the county of Cornwall may acquire the right to the tin within certain limits, according to the conditions and following the rules which will be found particularly stated in *Rowe* v. *Brenton*, 3 M. & R. 213, 497; S. C. 8 B. & C. 737;(*c*) and that the right, when so acquired, may be preserved by an annual renewal of the bounds; and that it is not necessary for its preservation that the minerals, if any, within the limits, should be

(*a*) In the Report of *Vice* v. *Thomas*, p. 39.
(*b*) See p. 32, note (*a*), antè.
(*c*) See p. 39, note (*h*), antè.

sought after, and the land worked for mineral purposes, by the bound owner or on his behalf.

*48] *The defendant contends that such a custom cannot exist in law, and consequently that the right laid in the declaration is not proved. The argument has proceeded on two grounds: the plaintiff contending, first, that, considered as a mere custom to be tried by the ordinary tests, this is not unreasonable; and, secondly, that it is not properly a mere custom so to be tried, but that it is the local law of an extensive district, anterior, it may be, in origin to the date when Cornwall became part of and subject to the general law of England; and that its effect is not to create merely an easement to be enjoyed in the land of another, but a tenement.

Although a decision on the second ground might dispense with a consideration of the former, it will be found, from the nature of the inquiry, more convenient to examine both in the order in which they are stated. In the great *Case of Mines*, Plowd. 310, 336, the Judges, as is well known, decided by a very large majority that, even where the gold or silver, in a mine of base metal, as tin, in the land of a subject, is of less value than the base metal, the mere circumstance of its existence there causes the prerogative of the Crown to attach upon it, and makes it a mine royal; and that the Crown has liberty to dig for it, place it on the surface, and carry it away. This resolution, however, clearly did not satisfy the learned reporter; he seems to have thought(*a*) it proceeded from ignorance "of the nature of base mines," all of which he surmises to contain *some* proportion of the richer and royal metals, gold or silver. The decision of the case, however, he observes, did not

*49] turn on this point; for that, *as the defendant there had pleaded, the intendment, which was to be the best for the Queen, must be that the gold and silver in the mines in question was of sufficient quantity and value, with reference to the base metal, properly to qualify the whole mine as a mine of the royal metals. Another resolution, therefore, of all the Judges in the same case, p. 336, remains untouched; that, if the ore or mine in the soil of a subject be of copper, tin, &c., in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or mine, and not the Crown by prerogative.

We have adverted to this case and these resolutions with a view to the important position from which the whole argument must start, the ownership, namely, of the tin mines, and from whom derived. And in this sense it is material to observe that, although the principal part of the precedents and authorities cited in the argument in Plowden were drawn from Devon and Cornwall, yet, even there, these were not urged as having any peculiarity of local history, which distinguished them either from each other or from the rest of England: on the contrary, they were used as applicable to the case in hand of a mine in Cumber-

(*a*) P. 339.

land: and, in the judgment, no distinction whatever was adverted to between the Stannary districts inter se, or between them and any other mineral tract in England.

Nothing has been alleged in the present case to bring this mine within the description of a Royal Mine: and we think it would be wrong to encourage the slightest doubt that, apart from all question of bounding, the ownership of a tin or copper mine in Cornwall is in the owner of the freehold of the soil, ratione soli, by *the common law of England, applicable to it as to any other mineral district in any other part of England. [*50

Upon this ownership, however, the custom of bounding has been engrafted: and, up to the extent to which both sides are agreed to admit it in fact, there can be no doubt that it is most reasonable, fulfilling every requisite of a good custom. In substance it is this: The mine is parcel of the soil; the ownership is in the owner of the soil; but it is a parcel which to discover and bring to the surface may ordinarily require capital, skill, enterprise and combination; which, while in the bowels of the earth, is wholly useless to the owner as well as to the public; and the bringing of which into the market is eminently for the benefit of the public. If, therefore, the owner of the soil cannot or will not do this for himself, he shall not be allowed to lock it up from the public: and therefore in such case (unless when by inclosure he may seem to have devoted the land to other important purposes inconsistent with mining operations, such as agriculture or building), any tinner, *i. e.* any man employing himself in tin mining, may secure to himself the right to dig the mines under the land, rendering a certain portion of the produce to the owner of the soil.

It is right to observe, in passing, how every step, even in this strong invasion of the rights of ownership, still is made with reference to them. In the first place, the land to be bounded (we speak of a supposed original case of bounding) must be wastrel: if it be several and inclosed, it must have been anciently bounded while wastrel, and so, in the language of the country, assured for wastrel: the liability must have first attached on it, therefore, before inclosure and devotion to other useful *purposes. Then, after the tinner or bounder has commenced by cutting the turves, and so marking out the limits within which he will work, proceedings are to be taken in the Stannary Courts, of which the owner has notice; and sufficient time is allowed before the bounder's title becomes complete, during which the owner may still intervene and preserve his rights entire, so as he will exercise them for the benefit of the public. If he abstain from any interference, it may well be considered that he has consented to the bounder's proceedings; and the customary render of the portion called toll tin may be a very sufficient consideration to him for what he gives up of his original exclusive rights. [*51

When, by the completion of the bounder's proceedings in the Stannary Court, his title is perfect, the question next material to be considered is, what is its legal character and amount. It is claimed on the present declaration as a tenement: it is contended by the defendant that it amounts to no more than an easement, and as such is bad in point of law. In the Case of *Vice* v. *Thomas*, reported by Mr. Smirke, the petitioner claimed under the bound owner: he stated that J. S. Enys was lawfully possessed of the tin bounds after mentioned, and granted to him, by indenture, liberty, license and power to dig, &c., throughout his tin bounds in Polberrow mine within certain described limits of the said mine, with liberty to dig drifts, shafts, &c. He then averred that, in pursuance of the liberties granted, he began to dig, work and search for tin and tin ore within and under the said bounds, and erected machinery, and continued to dig, till a certain time when he discontinued, but

*52] with full intention of returning *when convenient to him, and with that intention left his machinery standing upon the same bounds; that he had raised large quantities of tin, disposed of it to his own use, and paid the toll and farm respectively. He then complained of a forcible entry and dispossession by the defendants.

It is necessary to state the petition thus minutely, in order to apply the judgment which follows. "The next question then to be considered is, whether it is right to assume that possession of the mine might have been recovered in ejectment. The Vice Warden, in deciding this case, did not express any doubt that possession of the mine might be recovered in ejectment; his proposition was merely this, that a Court of Equity had concurrent jurisdiction with a Court of law. The cases cited at the bar during the argument show that *ejectment* will lie *for a mine in circumstances like those of the present case;* and I consider that such is the law of the case;" p. 35.

The judgment from which we have made this extract is of the highest authority: the case was very learnedly and ably argued; and His Royal Highness the Lord Warden was assisted by five most eminent judges. And this extract is the hinge on which the whole decision turned. But it certainly was not intended to lay down any thing contrary to former decisions of the common law Courts. The case of *Doe dem. Hanley* v. *Wood*, 2 B. & Ald. 724, was cited in the argument, where a grant by deed, not to be distinguished from that in *Vice* v. *Thomas*, was held to operate, not as a lease, but only as a license to enter and work. But it was truly answered that there the Court had only to construe the deed; here the

*53] *Lord Warden had to decide on the interest of the grantee who *had entered* and *worked* and *been in possession*, which possession he had never abandoned, but by his machinery was still maintaining; and such a case the Court, in *Doe dem. Hanley* v. *Wood*, 2 B. & Ald.

737,(*a*) expressly excludes from the effect of its then decision. However, in *Doe dem. Earl of Falmouth* v. *Alderson*, 1 M. & W. 210, S. C. Tyrwh. & Gr. 543, the defendant in ejectment entered into a consent rule to defend "for a certain tin-bound in the parish of, &c." (setting out the abuttals), "containing a certain mine, &c." It was objected, and the Court held, that a tin-bound, as such, was not recoverable in ejectment: and PARKE, B., asked the defendant's counsel why he could not defend for *a mine lying within certain bounds*, called tin-bounds, evidently having present to his mind the same distinction which had been taken in *Doe dem. Hanley* v. *Wood*, and was adopted by the Court in *Vice* v. *Thomas*, between a mere right to work, acquired by bounding, and the interest of a bounder in possession and actually working a mine.

This cause, the defendant having adopted the suggestion of the Court, went to trial (in the summer of 1846) before Mr. Baron ALDERSON.(*b*) It appeared that Lord Falmouth was the owner of the soil; the land had been bounded; there was a mine within the bounds; they had been duly renewed for a period extending as far back as living memory could go; and the mine had formerly been worked by the bound owners. In 1834, for some months, the defendant had attempted to *discover ore, but afterwards abandoned the mine and removed his machinery. In 1835, Lord Falmouth granted a sett to another party, who entered and worked successfully, upon whom the defendant entered, and [*54 forcibly expelled him. It must be presumed, though it is not stated, that there was in the declaration a demise by Lord Falmouth's lessee, as Lord Falmouth himself was clearly out of possession by his own grant. At the trial, the defendant did not show himself to be the assignee of the bounds: but his counsel contended that the evidence of outstanding bounds was in itself a defence as an outstanding term would be, whether the defendant had any interest in them, or claimed under the owner, or not. This of course assumed that the bound-owner's interest, though he should not be in possession, is a possessory interest, not a mere incorporeal liberty or easement: and the question this raised was not presented to the jury. Our brother PARKE says: "the first question is, whether the interest of the bound-owner is such a possessory interest as would enable him to bring ejectment; or whether he has a mere liberty to enter and get the mineral? The next question is, whether such an interest, if any, was in him at the date of the demise in the declaration? *The interest of the bound-owner depends on the custom, and ought to be found by a jury.*"

The case went down to a second trial in the summer of 1837, before my brother PATTESON, and, upon the first point, he stated, according to Mr. Smirke's report (p. 42), the question to be, "whether, by the cus-

(*a*) See *Jones* v. *Reynolds*, 4 A. & E. 805.

(*b*) *Doe dem. Earl of Falmouth* v. *Alderson*. Reported in the notes to Smirke's report of *Vice* v. *Thomas*, p. 39.

tom, the bound-owner has only an easement, that is, a right to enter and dig for tin, the possession of the soil and rest of the mine remaining in the lord; or, whether he has such an *interest and title in the mine that he may, for the purpose of getting tin, exclude the lord from the possession? It is difficult to see how this is to be put as a question of fact; but I am bound to do so; and if it should turn out to be, as I incline to think it is, rather a question of law, the Court above will know how to deal with it." The jury found that the bound-owner had not a mere easement, but a right to the mine. And the Court was not moved to review this part of the direction. Indeed, the counsel for the defendant scarcely could quarrel with it; the finding upon it was in their favour; and the verdict in the cause was for the plaintiff on the other question raised in it.

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In this case of *Doe dem. Earl of Falmouth* v. *Alderson*,(a) it is to be observed that the question did not arise upon any pleading, but upon the effect of evidence; what interest it was that the evidence, taken altogether, showed to be actually in the bound-owner; and this may have been a mixed question of law and fact, and so properly for the jury. In the case before us, the plaintiff has expanded the right, which he claims, on the face of the record; and, that being so, it must be for the Court to pronounce on its effect. And there can be no doubt that the claim on the face of this declaration not only falls short of asserting any possessory interest in the soil, but wholly excludes it.

Nor can the plaintiff maintain that the bound-owner's right by the custom goes beyond the statement in the declaration and yet may prove it, any more than he who claimed a right of common or a right of way over land could prove either by showing a title in the land itself; for, as, in those cases, although the landowner *may of course consume the herbage, or walk across the land, yet such incidents to the ownership are distinct in law from rights of common or way, so here the right claimed is claimed as a tenement distinct and complete in itself, and separate from possession of the soil or ownership.

*56]

We are very far from saying that the plaintiff has in his declaration narrowed improperly the customary right of the bound-owner, as it stands immediately after the delivery of possession to him by the stannary bailiff, and apart from the actual possession and working of a mine. In several of the cases, this fact has been relied on by the bound-owner, that possession was awarded upon the completion of the proclamations by the Stannary Court, and delivered under a writ of possession. Mr. Smirke, in his careful report of *Vice* v. *Thomas* (Appendix, p. 77), has given us the form of a writ of possession after the third proclamation. It recites the judgment for the owners, quòd "recuperent possessionem bundarum sive operis stannarii prædicti, vocat," &c., and then commands the bailiff to deliver the possession of the bounds or tin work, in the same

(a) Notes to *Vice* v. *Thomas*, p. 39.

words. This, therefore, throws no light on the legal character of the bounds, nor proves that any possession of the land passes. One test perhaps may usefully be applied. It is well known that the stannary customs, as the name imports, were confined to tin only; copper mining is of comparatively modern introduction into Cornwall; it is now discovered that the two metals are frequently found within the limits of the same work: but we apprehend that it never has been contended that the bounder, merely as such, working a tin mine and extracting copper from it with the tin, has any right to the copper. If not to the *copper, how can it be argued that he has any right except to the tin which he does extract, and to that which he may extract so [*57 long as he remains bound-owner, *i. e.* so long as those rights which he has first acquired by the custom are preserved to him by the custom, *i. e.* by his due compliance with all those rules which the custom imposes for their preservation?

This then brings us to the point which was more especially contested on the argument, whether this customary right can exist without continuing bonâ fide to search for tin, and to work the land for mining purposes within the inclosed limits; whether it is sufficient merely to renew the bounds annually by a new cutting of the turves as at the commencement. Assuming for the present the validity of the custom if the bonâ fide working within the bounds be made a part of it, and assuming that it is a custom which is to be tried by the tests established by the common law for ascertaining whether a custom be good or not, it appears to us that without this qualification it cannot be sustained. Customs, especially where they derogate from the general rights of property, must be construed strictly; and above all things they must be reasonable. Bounding is a direct interference with the common law rights of property; it takes from the owner of land, who is unable or unwilling at a particular moment to dig for tin under his waste land, the right to do so, it may be for ever, and vests it in a stranger, making only a customary render in return: it empowers the stranger not only to extract the mineral from beneath the surface, but to enter on the surface, and cumber it with the machinery, buildings and refuse stuff which the operations below occasion; and all this without the least regard to the convenience *or interests of the owner. The *only things* which [*58 make this reasonable are the render of the toll tin to the owner, and the benefit to the public secured thereby in the extraction of the mineral from the bowels of the earth. Both these are not only lost, but the latter, it may be, positively prevented, if the bounder may decline to work, and yet retain the right to exclude the owner. Instead of insuring that the minerals should be brought to the surface, the custom so construed may be made the means of keeping them locked up within it, and at the same time of preventing any improvement on the surface. Many bounds may become the property of the same owners, who may

think their interests best served by limiting the supply and diminishing competition, while the owner will decline to expend his capital in building or agricultural improvements, because at any moment the bounder may renew his operations and, entirely and without compensation, defeat the purposes of his expenditure. If it be said that the public good is best served by that regulated supply which best serves the private interests of the bounder, that wherever it is for the interest of the public that the mine should be worked, the interest of the bounder will be to meet the demand by an adequate supply, and that when the mine is not worked it is only because it is for the interest equally of both that it should not be; without admitting or denying the truth of these assertions, one answer is that, where such a state of things has existed so long and so decidedly as to amount to reasonable proof that the original purpose with which the bounds were inclosed has been abandoned, it is unreasonable to maintain the bounds themselves. It may have been that
*59] the owner did not inclose the land, or work for the mineral *himself, only on account of a temporary inability or the temporary existence of the same causes which the bounder now alleges as the ground for his ceasing to work. Why then is he to lose his earlier and better right for ever, and under the same circumstances the bounder to preserve his? Another answer is drawn from regarding the original purpose of the custom, which was not founded on the doctrine of demand and supply, but on the expediency simply of bringing the mineral to the surface for the use of men. Another, if another be needed, is that the render of a portion of the mineral to the owner of the land is part of the consideration on which the bounder's right was originally founded; it is part of the compact, without which it may be that the landowner would never have consented to the bounds; and it is of course quite independent of such considerations as that of working profitably to the miner. The condition that the bounds shall be annually renewed by new cutting the turves is useful for keeping the limits well ascertained, and also preserving the evidence of ownership; but it is no substitute for the working itself, considered as the ground on which the reasonableness of the custom rests.

When the evidence in this case is referred to, the variations and uncertainty in which those are involved, who contend that the bound-owner need not work strongly favour the conclusion in law at which we have arrived. The jury, indeed, have drawn a conclusion of fact from the whole, which, as such, we should not feel disposed to disturb; for it was their province to draw it from the statements submitted to them. But, on reading the report, and finding, among other things, that there
*60] is a conflict among the witnesses who from professional *habits might have been supposed best able to speak to the point, whether even an annual renewal of the bounds be necessary to preserve the ownership in the bounds, and also that much reliance seems to have been

placed on the fact, entirely inconclusive, that owners of land have in many instances not proceeded as for forfeiture of the bounds where the mines have not been worked, we see every reason to believe that the unqualified right now claimed is but an abuse of the original limits of the custom, inconsistent with its object, and not to be sustained on any principle.

Thus far we have assumed that the custom, qualified by the condition of bonâ fide working, is good in law. But it was strongly argued that, tried by one well established rule, it could not be sustained. It was said, and truly, that the bounder takes a profit in the soil of another, and that a right to do so cannot by law rest on custom. This doctrine was affirmed in *Blewett* v. *Tregonning*, 3 A. & E. 554, in which the earlier cases, from *Gateward's Case*, 6 Rep. 59 *b*, downwards, will be found collected. The plea in that case, on which the question arose,(*a*) was framed evidently with a view to escape from the resolution in *Gateward's Case;* but the Court would not admit the distinction in fact, and held the plea bad after verdict. But it is a misapplication of the doctrine to apply it to the case now before us: that stands on just, though strictly technical, reasoning, which may be well collected from the judgment in *Day* v. *Savadge*, Hob. 85, 86 (5th ed.), that that which is matter of interest, as the taking a profit from the soil, must for its existence have some person in whom it is; *and a flux body which has no entirety or permanence cannot take that interest which by [*61 the supposition is immemorial and permanent, because, from its nature, it cannot prescribe for anything. Necessity, however, will control this: the case of common of pasture exemplifies both the rule and the exception: in itself it is an interest; it is the taking a profit from the soil; it is properly matter of prescription; if the copyholders of one manor will claim it in the wastes of another, they must, because they can, do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe: but, if they claim it in *his* wastes, they cannot prescribe in their own names and rights by reason of the want of permanence; nor can they in their lord's name, for he cannot claim common in his own land: they are therefore from necessity allowed to claim it by custom. But what is the necessity? That growing out of the original compact, when they received permission to cultivate, for their own benefit and on condition of certain services, certain portions of the lord's land. That compact included the right of common on the lord's waste: and the law will not suffer that right to want a legal character, and so be without the means of its legal enforcement, though at the expense of strict legal reasoning. In the same way, the right now in question must have originated in each instance in a virtual contract: the owner has permitted the tinner to enter and work, when he will not work himself or devote his waste

(*a*) Plea 10 P. 562.

exclusively to other purposes by inclosure, on the condition that the tinner shall render to him a certain portion, fixed by custom, of the produce of the mine. Here, as in *the instance of a common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it in justice, cannot prescribe for it from necessity: therefore, that the undoubted right may not be defeated, they shall be allowed to claim it by custom.

*62]

Having arrived at this conclusion, we have only to consider the remaining point made by the plaintiff, that bounding was not to be tried merely as a custom limited in local extent, and as an exception on the general rules of the common law, but as the local law of a distinct and extensive district, having its origin, it may be, earlier than the time when Cornwall became a part of England, or subject to its general laws. This point was argued with much learning and ingenuity by Mr. Smirke: but we think his argument failed in respect of such historical certainty in fact as is necessary to build any legal conclusions on: further, assuming that difficulty overcome, we think it failed in legal authority. We have already observed, in the commencement of our judgment, that in the *Case of Mines*, Plowd. 310, no distinction was made between a mineral tract in Cumberland and one in Devon, or Cornwall, nor any between the stannaries in these two counties: the law as to the former was gathered from the precedents as to the latter. Whatever local usages may have prevailed in ages too distant for history or the legal antiquary to trace their records with certainty, Cornwall has been for so many centuries dealt with as parcel of the kingdom of England that they must now, and can only, in English Courts of Justice, be dealt with according to the *principles of the common law. This does not in any way conflict with our allowance of such local laws as gavelkind, or borough English, or tenant right: such as these we try by ordinary principles; and, having regard to their origin, we find them not unreasonable. And so with the usages in mineral districts, not alone Cornwall, but the King's Field in Derbyshire, Dean Forest, and others, have theirs; and they will be allowed, their reasonableness being tried by tests, not the same, in fact, but in principle, as we should apply to other local usages by a reference to their history, origin, and the local peculiarities on which they are to operate.

*63]

But, even had it been clear that bounding was a law of Cornwall before it was parcel of England, yet there are authorities to show that we could deal with it only on the same general principles which we apply to the testing of other customs. Those we have just mentioned. An instance of this sort is to be found in 7 Vin. Abr. 187, tit. *Customs*, (H), pl. 10, which will be found in the Year Book, Mich. 35 H. 6, fol. 27 B, 28 A, pl. 33, of a custom in the Isle of Man, not indeed in judgment there, but which shows the manner in which English Judges reasoned upon such customs as to their lawfulness. But a case precisely in point

is the celebrated one of *Tanistry* in Davys's Reports,(*a*) where the custom of descent, though of undoubted antiquity anterior to the introduction of the English law, was reasoned upon and finally decided against on the principles of English law, because uncertain.

The ground of inconvenience which might result from our decision in favour of the defendant was not *much pressed in the argument before us: but we collect from the report that it appeared in evi- [*64 dence that tin-bounds had for a considerable period been made the subject of conveyance, settlement and devise: and it is possible, therefore, that inconvenience may result where there has been such a neglect of working as to forfeit the title to them. We have not been insensible to this, and have given it our consideration: but it has not appeared to us to warrant a change in our conclusion, which ought to rest on legal grounds only. If the inconvenience be so great as may be apprehended, it is better that it should be remedied by the legislature than be made a reason for our coming to a conclusion which those grounds will not warrant. We do not apprehend, however, any such inconvenience. Nothing we have said compels the bounder to strictly continuous working: such reasonable time for consideration, preparation, and due selection of places and planes, must always be allowed as the nature of the undertaking reasonably requires; and, when he has once bonâ fide worked, his ceasing to work for a time will be therefore open to explanation, so as to prevent a forfeiture. It is only when the conduct of the bounder is such as to warrant the conclusion that he has ceased to be, in good faith, pursuing that object which alone justified his entry on the land, and which is the reasonable foundation of his title.

The present is such a case. We understand it to be admitted that, for many years, the bounder has ceased to work, and cannot succeed unless the custom, unqualified according to the statement in the commencement of our judgment, can be sustained. We are of *opinion that it cannot; and therefore our judgment must be that a nonsuit [*65 be entered, according to the leave reserved.

Rule absolute for a nonsuit.

(*a*) *Le Case de Tanistry*, Dav. 28 *b*.

For the following note, and others in the preceding pages, the reporters are indebted to Edward Smirke, Esq., who has also assisted in the preparation of the report.

The earliest recorded notice of any custom in Cornwall or Devon to work for tin on the land of another is to be found in the charters granted to the tinners in the reigns of John and of Edward I., by which the right is conferred, or confirmed to them, fodere stannum in moris et feodis episcoporum, abbatum, &c., sicut solebant et consueverunt, and in terris moris et vastis nostris et aliorum quorumcunque in comitatu, and divertere aquas ad operationem eorum, &c., sicut de antiquâ consuetudine consueverunt. These charters, and the principal franchises contained in them, are evidently designed for the immediate benefit of those who are there described as "operantes in stannariis," and to them only "dum operantur in eisdem." See

the charters in 4 Inst. 233, &c., and Appendix to *Vice* v. *Thomas*, pp. 8, 14. Nor are there wanting other proofs that the interest or property in tinworks could be claimed under the custom by those only who made it available by working, and that they became vacant or were forfeited by discontinuance.

In a register of the Black Prince, preserved among the public records, there is a writ, 25 Ed. 3, reciting that tinners, claiming any interest in tinworks, and refusing to work or contribute to the working, forfeit their shares by the ancient usages ("solonc les aunciens usages"); and the proper officer of the Duchy is commanded to enforce compliance with the custom by seizure of the forfeited shares. (See *Vice* v. *Thomas*, Appendix, pp. 24, 25.)

In a Stannary court roll, 4 Ric. 2, there is an entry of a plea of trespass, vi et armis, for breaking and entering a tinwork of the plaintiff and ejecting him from it; to which the defendants plead "quod dictum opus stann' fuit vacans die quo supponitur, &c., et per unum quart' anni ante, et petunt inde judicium. Et querens dicit quod non fuit vacans die, &c., et hoc," &c. (Appendix, ibid. p. 64.)

In another court roll of 21 Hen. 6 (Chagford Stannary), extant among the records of the Augmentation Office, Smith and Horn *complain of a trespass by disseising them of
*66] two parts of a tinwork: the defendant pleads that at the time of disseisin the work was "opus alay," and so he entered according to the Stannary custom. Verification: Denial. Issue thereon, and award of venire. The term *alay* is well known to be applied to a neglected or deserted tinwork. (Pearce's Laws, &c., of the Stannaries, pp. 194, 201, 226, &c.)

So little did the custom contemplate the possession of tin bounds by any except working tinners, that at a Devonshire Stannary Parliament, held 10 Hen. 7, and ratified by Prince Arthur, it was provided that "no persone, neyther persones, having possession of landes and tenements above the yerely value of 10*l*., nor noone other to theyr use, be owners of eny tynwork or parcell of eny tynworke," with the exception of persons claiming by inheritance or possessed of tinworks on their own freeholds. The original record is preserved in the Treasury of the Exchequer.

As late as the end of the 16th century the obligation of working was not forgotten in Cornwall; for Carew says: "These bounds he" (the bounder) "is bound to renew once everie yeere, *as also in most places to bestow some time in working the myne*, otherwise he loseth this priviledge." (Survey of Cornwall, f. 13 *b*, ed. 1769.)

These authorities, which a more extended search would doubtless multiply, seem to confirm the conjecture of the Court (antè, p. 60), "that the unqualified right now claimed is but an abuse of the original limits of the custom."

But the custom of bounding, even with the reasonable qualification of working suggested in the above judgment, must be admitted to be open to very grave objections.

No parol or documentary evidence has ever been adduced that prescribes any limit to the area capable of being included in a pair of tin bounds. The want of some clear rule on this head strongly distinguishes the custom of bounding from any other known mining custom, English or foreign. According to the learned reporter of *Rowe* v. *Brenton* (3 Man. & Ry. 497, note (*a*)), it must be of "reasonable extent;" but the test of reasonableness is not pointed out. Carew, an author of some authority on this subject who wrote in the reign of Elizabeth, says that, when a mine is found, "the first discoverer aymeth how farre it is likely to extend, and then, at the foure corners of his limited proportion, diggeth up three turfes," &c. (Survey, f. 13 *b*.) If this is the mode of fixing the limit of the bounds, it is one that must be founded on mere conjecture until the lode is opened, and its direction and dip ascertained, which cannot be done until the bounds have been made good by proclamation and possession. In other words, the limits of the bounded space can only be determined by a process which supposes them to be already fixed.

Again: if a large area is included, what extent of working within it will satisfy the custom, so as to protect the bounder in his enjoyment of the whole? Will inconsiderable workings in one part secure the exclusive *right to all? The question is of some practical impor-
*67] tance; for "a pair" (or party) of working tinners will make but slow progress in bringing to grass the mineral substrata of a large surface; and there is nothing in the custom to show that the size of the bounds is to be proportioned to the capacity or capital of the bounder. In practice, tin bounds are said to be usually of small extent; yet one of the witnesses in the case above reported had himself assisted in cutting a pair which extended "a quarter of a mile each way," and must therefore have contained about 160 acres. In Devonshire, where the same custom has prevailed, the whole of Dartmoor, consisting probably of 50,000 acres at least, was, in the year 1786, included in a single pair of bounds by a person who intended by this ceremony to secure to his employer all the tin within that district.

Further, the right of the bounder is of no value without the use of running water; and this

additional easement has therefore been constantly claimed as part of the custom. (Pearce, p. xiii., 190, &c.) It is recognised in the charters of John and Edward I., above cited (p. 65), and the roll of the Stannary Parliaments, and is often noticed in the entries of the "Opera Stannaria," or tin bounds, in the Stannary court rolls. Yet it is evident that the enjoyment of this easement involves a claim of right both to divert streams of water flowing above the bounded district, and to discharge the water, with its acquired impurities, over all the lands below it. That such a claim is likely to experience little favour from the Courts may be conjectured from the case of *Bastard* v. *Smith* (2 Moo. & Rob. 129).

The custom asserts a right, not only to take tin, but "to search for" it. (3 Man. & Ry. 497, 498, note (*a*).) Whether the search is to be justified only by the successful result of it, or the claimant is to dig at will for an unlimited time over the bounded area on the mere chance of success, is a matter on which the custom and its interpreters are silent. If the larger power exists (as it is usually assumed to do), it is one which may seriously affect titles; for all Cornwall is admitted to be stannary, and all Devon is *claimed* to be so. (See the Minute of the Privy Council, 7 Car. 1; appendix to *Vice* v. *Thomas*, pp. 36, 37.) The custom is indeed confined to *wastrel;* but inclosed land "that hath been anciently bounded and assured for wastrel," is included in this description (Convoc. 12 C. 1, art. 3, antè, p. 28, note (*b*)); and *all* Duchy land belonging to the seventeen assessionable manors, whether waste or inclosed, is asserted by the tinners of the Convocation, 26 G. 2, to be subject to the custom. (See art. 8, antè, p. 30, note (*b*).) Accordingly, it was stated by one of the witnesses, in the present case, that the parish church and cemetery of Helston are now actually situate within tin bounds; and by another witness, that he "believed all the lands of the Duchy in Cornwall were bounded or boundable."

The custom nowhere provides for the occurrence of veins of mixed metals, but is evidently adapted only to the superficial tinworks, formerly *very productive, called stream works. Mines are now worked indiscriminately for tin, copper, and such other metals as may [*68 be, and often are, combined in the same lode. The separation of them is a process of some nicety; and one mineral is sometimes sacrificed for the sake of the other. The adventurer avoids any question by taking a lease or licence from all parties interested in the different minerals: but the bounder, who relies upon the custom alone, must either claim, under that custom, a right to deal with, and, if need be, destroy the property of another, or must work at the peril of becoming an involuntary wrongdoer by detaching from the vein a metal which does not belong to him, and which was not the object of his search.

A still more serious difficulty will occur. There is a great extent of land in Cornwall, which is, or heretofore was, of customary tenure. The tenement of Galidna, mentioned in the case now reported, belongs to this class. In such lands the mines belong to the lord of the manor, and not to the customary tenant (*Rowe* v. *Brenton*, 3 Man. & Ry. 133; S. C. 8 B. & C. 737); and the toll tin is paid by the bounder to the lord, and not to the owner of the surface, who alone is injured by the workings, but to whom the custom awards no share or compensation at all. Hence the consideration mainly relied upon in support of the reasonableness of the custom fails in a large class of tenements, constituting probably more than one half of all the land subject to its operation. It is remarkable that in Devonshire, where the custom of tin bounding has also prevailed for some centuries, the title of the landowner, whether freeholder or customary tenant, to toll or to any other compensation whatever, has never been recognised. That the custom, as there claimed, is untenable in law can hardly be doubted; but the small extent of tin workings in that county, and the consequently inconsiderable value of tin bounds, make the validity of the custom a question of little importance. In Cornwall the subject is one of greater interest, both to the bound-owner, whose title is shaken by the above decision, and to the landowner, whose estate, though relieved from the existing servitude of dormant bounds, can no longer be protected from the intrusion of a *bonâ fide* adventurer by the convenient form of an annual renewal of bounds for his own use.

*HUNTER *v.* CALDWELL. *Feb.* 9. [*69

Declaration stated that plaintiff employed defendant as attorney to sue H. for the recovery of a sum of money; and thereupon it was the duty of defendant to use proper care in conducting the suit: yet defendant did not use proper care, in this, that, having, as such attorney, sued out writs for the recovery of the said money and for the purpose of saving the Statute of Limitations, he did not, upon H. not being found so as to be served with such writs, "duly file" the said writs with the proper officer, according to the necessary and accustomed prac-

tice of the Court of Queen's Bench; whereby the action was barred by the statute. Verdict for plaintiff, on Not Guilty.

Held,

1. Under stat. 2 & 3 W. 4, c, 39, s. 10, which enacts that, to save the Statute of Limitations, every writ issued in continuation of a preceding writ shall be "returned non est inventus, and entered of record" within one month after its expiration: That, although the statute 2 & 3 W. 4 did not in terms require such writs to be "filed," yet the word "file," in the declaration, might have the sense of bringing the writs to the office, and in that sense would be included in the word "returned" in the statute, and such filing would therefore be a necessary part of the practice in saving the Statute of Limitations, and a part of the attorney's duty. And that the Judge was right in so directing the jury.
2. That the question of negligence, in not complying with the practice of the Court, was a question of fact for the jury, under the Judge's direction as to the law.
3. That there was no ground for arresting the judgment, as, if there could be any sense of the word "file," in which it was defendant's duty to file the writs, the declaration was good after verdict.

The judgment on this last point was affirmed on error by the Court of Exchequer Chamber (Page 83, post.)

4. *Held* also, in the Court of Error, on objection that the declaration showed no retainer for the purpose of keeping the action alive, and, consequently, no duty to do so: That there were, in the allegations above stated, a duty sufficiently shown, and a breach well assigned.

CASE against an attorney for negligence. The declaration stated that the plaintiff had retained and employed the defendant as an attorney of this Court, to conduct a certain action in the said Court, at the suit of the now plaintiff, against one Hicks, for the recovery of 50*l*. which the plaintiff claimed to be due to him from Hicks, for fees and reward to the defendant in that behalf; and thereupon it became and was the duty of defendant, as such attorney, to use proper skill and due care and diligence in and about prosecuting and conducting the said suit; yet defendant, not regarding his duty in that behalf, did not nor would, as such attorney as aforesaid, use proper skill and due care and diligence in and about the prosecuting and conducting the said action; but, on the contrary thereof, defendant, as such attorney, then prosecuted and

*70] *conducted the said action in a careless and unskilful manner, in this, to wit, that defendant, having, as such attorney of and for the plaintiff as aforesaid, afterwards, to wit, on, &c., and on divers other days, &c., sued out of the said Court against Hicks, at the suit, in the name, and on the behalf, of plaintiff, certain writs, to wit, one writ of summons, one alias writ of summons, and fifty pluries writs of summons, for the recovery of the said sum of money, and for the purpose of preventing the aforesaid cause of action of plaintiff against Hicks from being defeated and barred by the Statute of Limitations, did not nor would, upon the said Hicks not being found so as to be served with any of the said writs, duly file the said writs, or any of them, with the proper officer in that behalf of the said Court, according to the necessary and accustomed practice of the said Court, but, on the contrary thereof, wholly neglected so to do: whereby and by reason whereof the said claims and causes of action of the plaintiff against Hicks, and plaintiff's action in that behalf, became and were wholly defeated and barred by the Statute of Limitations, and rendered useless to plaintiff, and plaintiff did not

succeed in his said action, but was defeated therein in this, to wit, that he the now plaintiff was obliged to consent, and did consent, that judgment should be entered against him upon the issue raised by the then defendant's plea of the Statute of Limitations, and was unable to recover, and did not recover, from Hicks, the sum of 50*l*., or any part thereof, &c.

Plea, Not guilty. Issue thereon.

The cause was tried(*a*) before COLERIDGE, J., at the Middlesex sittings after Michaelmas term, 1845. It *appeared that the defendant had acted as attorney for the plaintiff in an action against one [*71 Hicks, commenced by plaintiff on 1st June, 1833, upon a bill of exchange of which Hicks was the drawer and indorser, and also for money lent; in respect of which matters the right of action would have been barred by the Statute of Limitations on the 7th of that month. Hicks was not served with process until February, 1839: and the case of negligence was, that the writs of summons issued against him between 1st June, 1833, and February, 1839, to save the Statute of Limitations, had not been duly continued by the defendant, in compliance with stat. 2 & 3 W. 4, c. 39, s. 10, which provides that "no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration."

It appeared that there had been two instances of default in the continuance of process: one writ, being the twelfth in question, issued on 21st August, 1837, had not been returned till 22d January, 1838; and another writ, being the thirteenth, and issued on 13th January, 1838, had not been returned till 2d July *following;(*b*) and the neglect [*72 on the part of the now defendant was the not bringing these writs to the office of the Court in proper time, to be entered of record. The defendant, however, had indorsed the writs as returned on the proper days; and continuances were entered on the roll accordingly. The entry of continuance, was afterwards amended according to the fact, by rule of Court: and Hicks, who had pleaded, among other pleas, the Statute of Limitations, prevailed in the action in consequence of the discontinuance above mentioned. To show the practice with respect to returning writs to save the Statute of Limitations, and that the practice was gene-

(*a*) There was a former trial of this cause, on which a verdict was given for the plaintiff. Subsequently, a rule nisi was obtained by the defendant to arrest the judgment, or for a new trial on the ground of the verdict being against evidence. The rule for a new trial was made absolute, no decision being pronounced on the motion in arrest of judgment; and the question of costs was consequently reserved. See p. 83, note, post.

(*b*) See a further statement of the facts in the judgment of this Court, pp. 78, 79, post.

rally understood, and that the bringing the writ marked "non est inventus" to the proper officer of the Court was called "filing" the writ, several witnesses were called by the plaintiff; but their evidence was somewhat conflicting. The defendant, in his bill of costs delivered to the plaintiff, had made regular charges for "filing" the writs in question. The charges were ascribed generally to the term or vacation in which the writs had been filed, without any more particular date.

For the defendant it was contended that "filing" was not required by the statute; that, even if it was required, the practice was so new, and so little understood, that there was no evidence of gross negligence; and also that it was the Judge's duty to decide the question of negligence, and direct the jury accordingly.

The learned Judge was of opinion that the word "filing" might signify the bringing of the writ to the proper office; and, in that sense, would be included in the word "returning:" and he directed the jury to

*73] consider whether *at the time of the alleged negligence, the practice in question was settled, and well known to legal practitioners generally; observing that every attorney was bound to exercise reasonable skill on behalf of his client; and that it was for the jury to say, with reference to the practice and understanding of the profession, whether such reasonable skill had been exercised by the defendant. Verdict for plaintiff.

Knowles, in Hilary term, 1846, obtained a rule nisi for a new trial on the ground of misdirection; or for arresting the judgment.

Crowder, *Watson* and *Ball* now showed cause.(*a*) After explaining what degree of negligence would render an attorney liable, the learned Judge properly left it to the jury to say whether the defendant was guilty of such negligence under all the circumstances of this case. It is clear that the defendant was cognisant of the practice to be observed in continuing writs for the purpose of saving the Statute of Limitations. In his bill of costs he makes a regular charge for "filing" each successive writ; the first eleven writs were regularly filed; and, with respect even to the two writs which were not so filed, he procured continuances to be entered on the roll to conceal his laches. The evidence showed that the lodging the writ, indorsed "non est inventus," with the proper officer, was considered to be the filing of the writ. [PATTESON, J. Is the filing of the writ part of the return or of the entering of record?] It is part

*74] of the return. The term "filing" is generally *understood in practice to apply to the act of the attorney in taking a writ or affidavit to the proper officer of the Court, and not to any act of the officer himself. Thus, by Reg. Gen. Hil. 2 W. 4, I. 11, 3 B. & Ad. 376, "When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open." And, by the 12th rule (3 B. & Ad. 376), "the officer with whom it is filed shall

(*a*) Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

indorse the day and hour when it was filed." It is true that the statute itself says nothing about filing; but any enactment on the subject was unnecessary, because the "filing" is implied in the returning. For the same reason the statute does not express that the writ is to be taken to the proper office. At the time of the defendant's neglect, the statute had been in operation several years; the practice was generally known to the profession; and, even if it had not been so, it would be sufficient that the defendant knew it. Whether the duty in question is in strictness properly called "filing" or not, the defendant clearly omitted to do something which he ought to have done, and was therein guilty of negligence. [WIGHTMAN, J. The great question is, whether it is for the Judge to direct the jury that gross negligence has or has not been committed, or whether it is for the jury to form their own opinion after learning from the Judge what sort of negligence amounts to gross negligence. Lord DENMAN, C. J. I believe we have departed from *Laidler* v. *Elliott*, 3 B. & C. 738, where the Court seems to have taken upon itself to say that the negligence committed was not gross enough to give a right of action.] The present case shows that such matters are properly for *the jury to decide; the question may turn on all the circumstances [*75
in each particular instance: and here the defendant showed that he was well acquainted with the practice. In *Elkington* v. *Holland*, 9 M. & W. 659, the Judges of the Court of Exchequer differed as to the sufficiency of an attestation to a warrant of attorney, so that it might well be held (as it was there) that, assuming the attestation to be bad, there was no ground for charging the attorney with gross negligence. So in *Bulmer* v. *Gilman*, 4 Man. & G. 108, where a parliamentary agent had misconstrued one of the standing orders of the House of Lords, it was held that the jury had been properly directed that he was not liable for negligence, because the meaning of the order appeared to be very doubtful. In neither of the cases cited was any question made whether the question of negligence was to be disposed of by the Judge or by the jury; but in both cases the question was left to the jury, with such directions as were justified by their peculiar circumstances. It seems very difficult to say that the question of negligence can in any case be withdrawn from the jury. This was the opinion of the Court in *Doorman* v. *Jenkins*, 2 A. & E. 256.

Secondly, there is no ground for arresting the judgment, unless the Court, after verdict, finds the declaration to be so insensible as to disclose no cause of action. The declaration charges that defendant did not "file" the writs "according to the necessary and accustomed practice." The objection taken is rather in the nature of a special demurrer on the ground that the statute does not use the word "file;" but the declaration imports, after verdict, that, by the "necessary and *accustomed practice," the defendant should have filed the writs, [*76
and that he did not.

Knowles and *Rawlinson*, contrà. The question involved in the present case was so much a matter of law that the learned Judge should have taken it upon himself. The statute does not require the writs to be "filed." Tidd's New Practice, p. 17, in treating of the practice of continuing process since stat. 2 & 3 W. 4, c. 39, says nothing of filing. In *Knowles* v. *Stevens*, 1 Cr. M. & R. 26, S. C. 4 Tyr. 1016, it was held a bad plea, to debt on bail bond, that no affidavit of debt had been filed against the principal: "the statute" (12 G. 1, c. 29, s. 2), ALDERSON, B., observed, "does not say 'made and filed.'" The practice in continuing process to save the Statute of Limitations was the subject of discussion in *Williams* v. *Roberts*, 1 Cr. M. & R. 676, S. C. 5 Tyr. 421, and *Williams* v. *Williams*, 10 M. & W. 174; yet there is no intimation in those cases that filing the writs is any part of such practice: and, by the practice before the statute, the continuances were mere matter of form, and might be entered at any time. There was, then, no question for a jury. If an attorney were sued for allowing his client to execute a lease with unusual covenants, could the jury decide what covenants were usual? It is difficult to understand how the question in the present case could be for the jury, when, in an action for malicious prosecution, according to *Blachford* v. *Dod*, 2 B. & Ad. 179, and *Panton* v. *Williams*, 2 Q. B. 169,(*a*) the question of probable cause is for the Judge.

*77] *Elkington* v. *Holland*, 9 M. & W. 659, and **Bulmer* v. *Gilman*, 4 Man. & G. 108, show that questions of negligence, with reference to matters of law, are virtually for the sole determination of the Judge. Even if filing is necessary, it is no part of the attorney's duty. He has merely to return the writ, that is, take it to the proper office, and is not answerable in respect of anything that may be done with the writ afterwards.

Secondly, the judgment must be arrested. Stat. 2 & 3 W. 4, c. 39, s. 10, does not require the writs to be "filed." Assuming that "filing" is necessary according to the practice of this Court, such practice is not added to the statute: and a Court of error, in dealing with this declaration, would know nothing of such practice. At all events, the declaration should have averred that "filing" was necessary according to the practice: if there had been such an averment, it might now be taken to have been proved.

Another objection to the declaration is, that it does not allege that there was good cause of action against Hicks. It is said in note (1) to *Benson* v. *Welby*, 2 Wms. Saund. 150 *d*, 6th ed., which was an action for an escape: "It is necessary in this action to aver and prove that the plaintiff had a cause of action against the person who escaped;" and, in note (*a*): "The same rule holds in an action against an attorney for negligence in conducting a suit." *Cur. adv. vult.*

(*a*) See *Turner* v. *Ambler*, decided in this vacation. Post.

Lord DENMAN, C. J., on a subsequent day in this vacation (February 25th), delivered the judgment of the Court.

This was an action for negligence, against an attorney, in which a verdict passed for the plaintiff a second time *on a new trial. The defendant now seeks to set that aside on several alleged grounds of misdirection, or to arrest the judgment for a defect in the declaration. [*78

The action in which the alleged negligence took place was one in which Hunter sued one Hicks, and it had become necessary to comply with the requisitions of the 10th section of stat. 2 & 3 W. 4, c. 39, in order to save the Statute of Limitations. Caldwell was Hunter's attorney, and had in two instances failed to comply with them; and Hunter was in consequence nonsuited.

On the present trial it was alleged that there had been a miscarriage on the part of the learned Judge in three respects; the declaration alleging that the defendant "did not" "duly file the said writs" with the proper officer "according to the necessary and accustomed practice" of the Court, and the negligence proved in fact having been the not bringing to the Treasury of this Court, in two instances, the writs issued to save the statute, till after the expiration of the five months limited by stat. 2 & 3 W. 4, c. 39, s. 10, in order to their being entered of record. The learned Judge is said to have been wrong, first, in holding that "filing" was at all made necessary by the statute; secondly, in saying that "filing" was included within the word "returning," which is the expression used by the statute; and, thirdly, and more materially, in leaving the question of negligence to the jury, who ought to have been directed by him, as on a matter of law, that the omission proved did not amount to that crassa negligentia for which alone an attorney could be responsible in damages.

It appeared at the trial that Hicks was the drawer of bills given by him to the plaintiff, who had a claim on *him for money lent, and that the Statute of Limitations would run against them on the 7th June, 1833. Hicks was keeping out of the way; and there appeared no immediate prospect of being able to serve him: this was the state of things when the defendant was retained by the plaintiff; and the immediate object was to keep alive the right of action. Accordingly, the first writ was sued out, 1st June, 1833; and Hicks was not served till February, 1839: for the interval the writ was duly continued, except in two instances, in one of which a writ issued in continuance was brought to the office two days too late, in the other nineteen. [*79

The statute provides that no first writ shall be available to prevent the operation of the statute limiting the time for commencing the action, unless (as applicable to the present case) "such writ and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and

unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and" (this word should probably be "*such*") "return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

Two things are in terms required by the statute to be performed within the limited time: returning non est inventus, and entering of record; the former of which, *in process not bailable, as this was, *80] is to be done by the plaintiff's attorney, where he sues by attorney; the latter beyond any question must be done by the officer of the Court. But, as this officer's duty is limited to the entering of such writs on record as are brought to him, a duty clearly arises on the attorney, who sues out the writ, and returns it non est inventus, to bring the writ to him for the purpose within the limited time; and this duty arises upon the requisitions of the statute; it is implied from them, if not expressed in the words. Before the statute passed no such duty existed, for no continuances need have been entered, until the Statute of Limitations was pleaded, and the plaintiff came to reply thereto. Since the statute, the whole object of suing out the writ, of indorsing the date, and returning it non est inventus, will be defeated, unless the writ be in due time carried to the office: and it would be unreasonable to hold that it is not incumbent on the attorney to do this, who has the custody of the writ, and who alone can be presumed to know anything of the requirements of the statute. In the present case it would be specially unreasonable; for under the circumstances it was the main object of his retainer to keep alive the right of action by a due observance of the statute.

At the trial, this duty of bringing to the office was urged by the plaintiff to be imposed by the statute, and to be properly described by the word "filing," which it was said was included under the word "returning:" the declaration, however, charged only a neglect to file "according to the necessary and accustomed practice" of the Court; and the Judge, adverting to the language of the statute, and pointing out that the word "filing" was not found in it, told the jury that he thought that word *in the declaration might have the sense of *81] bringing to the office, and that, in that sense, filing was included under the word "returning," and was therefore a part of the attorney's duty. And to this we see no objection: the allegation has reference to the practice of the Court; and the word "filing," in reference to matters of practice, is very commonly used to express the duty of bringing to the proper office, as the case may be, writs, pleadings, affidavits and other such matters for safe custody, or enrolment. The duty of filing in this sense may be properly considered as included under the word

"returning;" for an attorney merely to write "non est inventus" on the back of a writ, and put it in his desk, is not to complete the act of returning it, which properly means, in this case, to make such answer, touching the execution of the writ, as shall authorise the issuing of another in continuation of it, and connect the two together on the same record; and for this purpose a necessary step is the bringing to the office. It was not contended that "filing" was the duty of the attorney in any other sense than this; nor could it be: if filing means only the putting on a file in the office, or doing anything with it after it arrives there, that clearly must be the duty of the officer, and cannot be chargeable on the attorney; he cannot, indeed, be allowed to meddle with it for that purpose. The Judge, therefore, could not nonsuit on this objection as for want of proof; if available at all, it was upon the record. These remarks dispose of the two first grounds taken on the argument.

On the third ground, we think the question of negligence by not complying with the practice of the Court was a question of fact for the jury, although, like many *others which turn on matters of law, it was proper to direct the jury positively as to the premises from which [*82 they were to draw their conclusion. Thus it was the province of the Judge to inform the jury for what species or degree of negligence an attorney was properly answerable, and what duty in the case before them was cast upon him either by the statute or the practice of the Court; but, having done this, it was right to leave to them to say, considering all the circumstances, and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and, in the second, in case of non-performance, whether the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining or sustaining an action. The learned Judge appears to have done this; and it is not objected that he left the case too favourably for the plaintiff; indeed we are inclined to think that a two-fold omission, and in one instance for nineteen days, by an attorney employed for the very purpose of keeping the action alive, and charging his client for the performance of a plain duty, would have warranted a stronger direction.

We come lastly to consider whether the judgment ought to be arrested: and this was contended for on the ground that the declaration disclosed no duty the breach whereof was actionable; in other words, that neither by the statute nor according to the practice of the Court was it the duty of the attorney to file the writ. Now, if there be any sense of the word "filing" according to which by the practice of the Court it is his duty to file the writ, after verdict that will be sufficient: and we have already said that we think filing may reasonably be understood of bringing the writ into the *office for the purpose of its being entered on record, and that it is the duty of the attorney to bring it in. It is unnecessary, therefore, to go at greater length into this point. [*83

The rule therefore will in all points be discharged.

Rule discharged.(a)

(a) Reported by H. Davison, Esq.

April 26.

After a verdict for plaintiff, defendant obtained a rule nisi for a new trial on the ground of the verdict being against evidence, or to arrest judgment. The Court, on cause shown, granted the rule for a new trial, but did not decide the other point, and reserved the question of costs. Plaintiff succeeded again: and defendant obtained a rule nisi for a new trial, or to arrest judgment on the ground formerly taken. The rule was discharged.

Ordered that defendant should pay the costs of the first trial.

In Easter term (April 26th) 1847, *Crowder* moved that payment of the costs of the first trial (see p. 70, note (a), antè) by the defendant might be ordered as a part of the rule discharging the former rule nisi. The point had been mentioned immediately after the delivery of the above judgment, and the consideration of it reserved. *Knowles* and *Bovill* showed cause in the first instance. *Crowder* and *Ball* supported the rule.

Per Curiam. (Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.) The defendant must pay the costs of the first trial. The refusal of the Court to arrest the judgment on the second trial has the same effect now as if it had been pronounced on the first trial: and therefore the new trial must be considered as having been granted on the ground of a verdict against evidence, and consequently on payment of costs. Rule absolute.

In the Exchequer Chamber.

(Error from the Queen's Bench.)

CALDWELL *v.* HUNTER. [*Feb.* 3, 1848.]

For syllabus, see p. 69, antè.

ERROR was brought upon the above judgment. Besides the common assignment, it was specially assigned for error, that the filing of the said writs was not necessary for the purpose of saving the Statute of
*84] *Limitations; and that it was not the duty of the defendant below (plaintiff in error) to file such writs.

Bovill, for the plaintiff in error. The declaration charges the plaintiff in error with a breach of duty in not filing certain writs issued for the purpose of saving the Statute of Limitations. But the retainer and employment are not so alleged as to show that any such duty attached. It is alleged that he was retained and employed to conduct a suit for the recovery of money. It is afterwards alleged that he sued out writs for the recovery of the said sum of money "*and* for the purpose of preventing the aforesaid cause of action," &c., "from being defeated, and barred by the Statute of Limitations." But the last mentioned purpose, for the nonfulfilment of which the action is brought, is not within the terms of the alleged employment. [MAULE, J. The particular breach is laid under a videlicet, and is preceded by a general allegation of negligence; the declaration, after verdict, would be good without setting out the particular manner in which the duty was neglected. CRESSWELL, J. He sued out the writs for the purpose for which he was employed, and did not keep the action alive. He is so to conduct the suit that the statute

may not run. Unless the alleged instance of negligence, viz. his not filing the writs, is conclusive against the general allegation of negligence, the declaration is sufficient.] (On this point *Bovill* referred to *Granger* v. *Collins*, 6 M. & W. 458, where it was held that the promise was laid more largely than the premises in the declaration would warrant.)

Secondly. Stat. 2 & 3 W. 4, c. 39, s. 10, does not make it necessary that writs in continuance of process *should be filed. [CRESSWELL, J. The declaration does not allege that the duty arose out of the statute, but out of "the necessary and accustomed practice" of the Court. How can we tell whether it did so or not?] This Court will take judicial notice of the practice of all the superior courts. The practice in this matter is prescribed by the statute; and, if the practice alleged in the declaration is other than the practice so prescribed, it cannot be the proper practice. The statute prescribes that the writs shall be returned and entered of record, and nothing more. If the filing is a necessary part of the return, the declaration should have alleged that the writs were not returned; if it is a necessary part of the entering on record, that they were not entered of record: if it is no part of either process, then it cannot be necessary. [PARKE, B. It may be one of the steps in either process, and it is stated to be necessary.] (*Bovill* then proceeded to cite the same authorities which have been already mentioned in the report of the argument below, to show that filing was not necessary.) [*85

Watson, contrà, was stopped by the Court.

PARKE, B. We think the breach in the declaration is well assigned. The duty alleged is that the defendant should "use proper skill and due care and diligence in and about prosecuting and conducting the said suit;" and the breach is that he "did not" "use proper skill and due care and diligence" in that behalf. The instance given of his want of care is that he did not "duly file" certain writs, which he knew were sued out for the purpose of saving the Statute of Limitations, "with the proper officer in that behalf of the said Court, according to the necessary and accustomed practice of *the said Court." After verdict we must take it to be part of the necessary practice that the writs should be so filed. The reason given by the Court of Queen's Bench is quite satisfactory: "if there be any sense of the word 'filing' according to which by the practice of the Court it is his duty to file the writ, after verdict that will be sufficient." [*86

MAULE, J. The finding of the jury establishes that it is part of the practice of the Court of Queen's Bench that the attorney who sues out writs for the purpose of saving the Statute of Limitations should "file" them with the proper officer of the Court. It has been argued that this Court is bound to notice the practice of the superior courts, and that we cannot fail to notice that there can be no such practice as the jury have found. There certainly are instances where judicial notice is taken of

business, and sell it on better terms on account of the protection secured to it by such an agreement.

PATTESON, J. I am of the same opinion. Even if the cases cited did establish the point, which they do not, that the jury were bound to give 20*l.* as damages in this case, yet that 20*l.* is not the subject matter of the agreement. With respect to the other point, the agreement is perfectly legal; the restraint of trade is limited as to distance, although it is not as to time.

COLERIDGE and WIGHTMAN, Js., concurred. Rule discharged.(*a*)

(*a*) Reported by H. Davison, Esq.

LOVELOCK *v.* FRANKLIN. *Feb.* 9.

(On motion for a new trial.)

Reported, 8 Q. B. 379.

*91] *The QUEEN *v.* The Churchwardens and Overseers of BANGOR. *Feb.* 10.

Under the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 3, the Poor Law Commissioners having, by order directed to the guardians of a union, ordered that a survey of a parish within the union should be made and the money provided for by a charge on the rates of the parish; and the guardians having ordered the officers of the parish to make a separate rate for raising the required sum: *Held*, that the order of the guardians was bad, because, if the statute gave them power to choose in which of the two modes payment should be made, then the order of the Poor Law Commissioners was invalid, as illegally directing payment in one mode, and the guardians were therefore making an order of their own authority, which they could not do.

Quære, whether, under this section, the order of the Poor Law Commissioners that a survey should be made, ought not to be addressed to the guardians, parish officers, and other officers from whom the "representation" mentioned in the first part of sect. 3 proceeds.

Quære, whether the words "as they may see fit," in this section, refer to the Poor Law Commissioners or the guardians.

Quære, whether, under stat. 4 & 5 W. 4, c. 76, s. 105, rules bad in themselves, but not removed by certiorari, must be obeyed; or whether that section only provides that rules removed by certiorari must be obeyed until they have been declared illegal by the Court of Queen's Bench.

MANDAMUS to the churchwardens and overseers of the parish of Bangor, Carnarvonshire.

The following facts were set out in the suggestion of the writ: That a representation had been made by the churchwardens and overseers aforesaid to the Poor Law Commissioners, that a fair and correct estimate for the purpose of making rates for the relief of the poor, in conformity with the requirement of the Poor Rates Assessment Act, 6 & 7 W. 4, c. 96, could not be made in their parish without a new assessment: That, in consequence, the Poor Law Commissioners made an order, dated 19th July, 1838, in pursuance of their powers under the said act, directing

that a survey and valuation, &c., should be made, and that the guardians of the poor of the Bangor & Beaumaris Union (in which Bangor is contained) should contract with and appoint a surveyor to make such survey and valuation within a time and on terms to be specified in the contract. The order also directed that the money which should be paid under such contract for such survey and *valuation should be paid by the said [*92 guardians, and should be provided for by a charge on the poor rates of the said parish, such charge to contain a provision for paying off not less than one fifth of the sum so charged on the rates, and the interest to accrue thereon, in each succeeding year, until the whole should be repaid. In pursuance of the above recited order, the guardians of the said Union appointed one Edward Phillips to make such survey and valuation under a contract specifying as above. E. Phillips made and completed the survey and valuation within the time specified in the contract, and thereby became entitled to the sum of 343*l.* 11*s.* 6*d.*, which sum the then churchwardens and overseers of the poor of the parish of Bangor were on the 10th January, 1839, duly authorised and required by the guardians of the Union to pay to E. Phillips, on or before the 8th March then next ensuing, out of the poor rates of the parish. This the churchwardens and overseers refused to do: and the sum had not at the date of the writ been paid. On 1st January, 1842, E. Phillips commenced an action against the said guardians for the said sum of 343*l.* 11*s.* 6*d.* On 3d March, 1842, the said guardians gave notice to the then churchwardens and overseers of the poor of Bangor, that they, the churchwardens and overseers, might, if they thought proper, defend the action in the name of the said guardians, upon giving them indemnity. But neither they, nor any other churchwardens or overseers of Bangor, ever appeared to or defended the action; and the same yet remained undetermined at the date of the writ. On 9th March, 1842, a second order was duly made by the guardians of the said Union, requiring the then churchwardens and overseers of the poor of Bangor to make a *separate [*93 rate in pursuance of the provisions of stat. 6 & 7 W. 4, c. 96, for the purpose of raising the said sum of 343*l.* 11*s.* 6*d.*, and therewith to pay to the said guardians the said sum due from them to Edward Phillips: which order was duly served on the said then churchwardens and overseers; but which they wholly neglected and refused to obey. Another order to the same effect, bearing date 17th January, 1844, was made by the guardians, and duly served upon the then churchwardens and overseers, but was also disregarded.

The mandatory part of the writ commanded the churchwardens and overseers to obey the two last mentioned orders of the said guardians, or to make some other provision for raising the said sum of money for the purpose aforesaid, or show cause why they should not do so.

Return. That the said guardians had not at any time paid the money which should have been paid under the said contract for the said survey

and valuation, as they were directed to do by the order of the Poor Law Commissioners of 19th July, 1838: nor had they provided for the same by any charge on the poor rates of Bangor, containing a provision for paying off not less than one fifth of the sum so charged, and the interest thereon, in each succeeding year, until the whole should be repaid, as they were also directed in the said order of the Poor Law Commissioners; but had required the churchwardens and overseers to pay the said sum of 343*l.* 11*s.* 6*d.*, and to raise the same by a separate rate, &c. (as in the two several orders of 9th March, 1842, and 17th January, 1844). And that the said orders of the said guardians not being authorised by, or in conformity with, the said order of the *Poor Law Commissioners, they the churchwardens and overseers had refrained from obeying the same. Other objections were taken by the return, viz.: That the appointment of Edward Phillips as surveyor was invalid, as not sanctioned by the then churchwardens and overseers, and that his survey and valuation were incorrect and defective, so that a poor rate assessment made upon them would probably be appealed against, &c.

*94]

Demurrer, on the following (among other) grounds: That the said return does not state or show any sufficient ground to excuse the said churchwardens and overseers from making and assessing a rate upon the inhabitants and occupiers of the parish for the purposes in the mandatory part of the writ mentioned, and from proceeding to levy, collect and pay over the proceeds of the same, as in the said writ commanded, or from making some other provision for raising the said sum of 343*l.* 11*s.* 6*d.*, and paying the same to E. Phillips; and also for that the churchwardens and overseers were bound to obey and comply with the orders of the guardians of 9th March, 1842, and 17th January, 1844, and to raise, and provide the guardians with, money sufficient to enable them to pay E. Phillips. That it was not necessary, nor required by stat. 6 & 7 W. 4, c. 96, that the guardians of the said Union should first pay for the survey and valuation, in order to entitle them to call on the churchwardens and overseers to raise the money due for the same and pay the same to the guardians: That the guardians were not bound to provide the money due for the survey and valuation by a charge on the rates of the parish, and were at liberty to make provision for the same by a separate rate if they should see fit, and to order the churchwardens and *overseers to make and levy a rate for that purpose and to pay over the proceeds thereof to the guardians: That the churchwardens and overseers had power to charge the poor rates with the expense of the said survey, &c., and ought to have raised and paid over to the said guardians the said expenses, &c.

*95]

The demurrer was argued in Hilary term, 1847.(*a*)

Sir *John Jervis*, Attorney General, for the Crown. The Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 3, renders it lawful under certain

(*a*) January 16th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

circumstances for the Poor Law Commissioners to order a survey to be made and taken of the messuages, lands, &c., liable to poor rates in any parish, or all or any one or more parishes of an union, and a valuation to be made, &c., "and to direct *such guardians* to appoint a fit person or persons to make and take every such survey," &c., "and valuation, and to make provision for paying the costs of every such survey," &c., "and valuation, either by a separate rate or by a charge on the poor rates, as they may see fit." In the present case, the Poor Law Commissioners ordered the guardians to appoint a surveyor to make a valuation, and directed also the payment to be by a charge on the rates: but the guardians contended that in this the Commissioners exceeded their power. The guardians then made an order, requiring the parish officers to make a separate rate for the same purpose. The question is, whether the Poor Law Commissioners, or the guardians, are the parties who are to direct in what mode the sum for paying for the survey is to be *raised: viz., by a charge on the rates, or by a separate rate. [*96 Upon the ordinary construction, the guardians are the parties. The last antecedent to the words "as they may see fit" is "the guardians." The option is therefore left with them. And this is the reasonable construction, inasmuch as the guardians must be presumed to be the parties best fitted, by local knowledge, to judge which mode is the most advisable. [WIGHTMAN, J. Might not the word "they" refer to "commissioners," the word which governs the sentence?] As far as mere grammatical construction goes, it might. The section may be read either way: and that contended for by the guardians is certainly the more convenient. As to the objection, that a separate rate involves a charge on future parishioners, that has equal force against the other mode, viz. of charging the poor rates for a certain number of years, and equal, also, whether the commissioners or the guardians make the order. In a similar case, under stat. 59 G. 3, c. 134, and subsequent church building acts, it was held that such past charges must be paid out of a separate rate; *Rex* v. *Churchwardens of Dursley*, 5 A. & E. 10.

Watson, contrà. There are three ways of construing the section: 1. The commissioners may make the order, directing either a charge on the rates or a separate rate; 2. They may make an order directing the guardians to provide for the payment, and specifying the mode; 3. They may simply direct the guardians to make provision, leaving the mode to them. On each construction, the defendants are entitled to judgment. *Here, the guardians are ordered to provide for the [*97 payment by a charge on the parish poor rates. The guardians, on the contrary, order the parish officers to make a separate rate. [COLERIDGE, J. It is contended that they may, if the words "as they may see fit" apply to them. Then the whole turns on those words, or, according to the argument, if the specific direction of the commissioners was given without authority, their order in this respect may be rejected

as surplusage.] But, if that order was illegal, as exceeding the authority of the commissioners, then, by stat. 4 & 5 W. 4, c. 76, ss. 89, 105, the guardians ought to have removed it by certiorari instead of disobeying it. They were bound by it until quashed.

Sir *J. Jervis*, Attorney General, in reply. Sect. 89 applies only to orders making charges on the rates: s. 105 refers only to orders in the administration of the Poor Laws, of which this is not one, stat. 5 & 6 W. 4, c. 96, not being incorporated with the former act.

Cur adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was a mandamus to the churchwardens and overseers of Bangor to make a rate for the purpose of raising a sum of money to pay the costs of a survey and valuation of the rateable property in the parish, which was alleged to have been made under the third section of stat. 6 & 7 W. 4, c. 96. The case came on upon a demurrer to the return: but the argument was substantially on the goodness of the writ; and that was made to depend on the true construction to be given to the section above mentioned.

*98] *The facts appearing in the writ are shortly these. Bangor parish is in the Union of Bangor (for what purposes formed is not stated; but it was taken to be a Union for the administration of relief only): and in 1838 the churchwardens and overseers made a representation through the guardians of the Union to the Poor Law Commissioners that a survey and valuation of the rateable property were necessary to be made: whereupon the Poor Law Commissioners ordered the making, and directed the guardians to appoint a proper person for the purpose, to contract with and pay him; and that the money should be provided for by a charge on the poor rates of the parish, which charge should contain the provision required by the section in question, for the payment of the interest and the whole principal in five years. An appointment and contract have been made and entered into: the work has been done: and the guardians have been sued on their contract. After many ineffectual attempts to procure funds from successive parish officers, but never by way of charge on the rates, the guardians have ordered the defendants to make a separate rate for the raising the required sum; which the defendants have disobeyed; and the mandamus is for the purpose of enforcing obedience.

The section is framed with remarkable carelessness; and it is impossible to determine with certainty its meaning in all parts. It begins with supposing a representation made either by guardians of a union, or parish, or majority of parish officers competent to make a rate; and then, without any enumeration of these three bodies, or direct reference to them all, empowers the Poor Law Commissioners to direct "*such*"

*99] guardians to appoint a fit person, and to make provision for *paying the costs either by a separate rate or by a charge on the poor

rates as *they may see fit.* It may well be doubted whether the words "*such guardians*" are not used by way of reference to all the particular bodies before enumerated, and whether the order of the Poor Law Commissioners ought not to issue to that body, whichever it was, from whom the representation came: they clearly must include both descriptions of guardians: and the doubt is the stronger, when it is remembered that at the time of the act passing a large proportion of the parishes in England were not combined in Unions. If this be the true meaning, then, as the representation in the present instance came from the parish officers, the order was bad, for not being addressed to them but to the guardians.

Supposing, however, the order to be well made in this respect, a more serious doubt arises on the meaning of the words "*as they may see fit.*" Do they place the discretion which is to determine the mode of raising the funds in the Poor Law Commissioners or in the guardians? in those who issue the order in the first instance, under which the survey is made, or in those to whom it is issued? The guardians are the last *expressed* antecedent; but, if the words "it shall be lawful for the Poor Law Commissioners" are to be read as governing each clause of the sentence, then *they* become the last antecedent: so that the application of the ordinary rule of construction will not solve the difficulty. It appears to us not necessary to express any decided opinion on this question; for, if we agree with the prosecutors that "as they may see fit" must be read as if it were "as the guardians see fit;" still it is clear that the guardians can only acquire the *discretion in consequence of a direction from the Poor Law Commissioners. These last must first [*100 direct them to provide for the payment in one or other of the two ways according to their discretion, before they have power to provide for it in either. But the Poor Law Commissioners have made no such order; they have ordered a charge on the rates: and, assuming that to be void, it only leaves the order of the guardians as one issuing from them mero motu: and, as all their power proceeds from the statute, and the statute gives them no such original power, it seems to us that this order of theirs was clearly invalid.

This mode of decision makes it unnecessary to decide on the validity of the order of the Poor Law Commissioners. The guardians must of course contend that it is bad in part: but it has never been removed by certiorari into this Court and quashed; and the defendants, therefore, contend that, by the 105th section of stat. 4 & 5 W. 4, c. 76, it must be obeyed, even if bad. That section indeed only provides in terms for orders removed by certiorari; whether it extends to orders, bad in themselves, but not removed, it is unnecessary to determine. If it does, it becomes an additional reason for holding the order of the guardians, which is made in contravention of it, invalid; if it does not, and we may

set it aside in this collateral way, still it leaves the guardians without any authority to make the order in question.

We are of opinion, therefore, that judgment must be for the defend ants. Judgment for defendants.(a)

(a) Reported by H. Merivale, Esq.

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*101] *WILLIAM THOMPSON v. GEORGE PETTITT and GEORGE ROBINS. *Feb.* 10.

By agreement, reciting (as the fact was) that plaintiff had discounted a bill for S., and that S., in consideration thereof, had deposited with plaintiff, as a collateral security for repayment, the lease of his house, and had also assigned to him the fixtures as per inventory, S. undertook, if the bill should be dishonoured, to execute a mortgage to plaintiff of the lease (such mortgage to contain the usual power of immediate sale), together with the fixtures as per inventory, such lease and fixtures to be sold by auction or otherwise, and, after repayment of debt and expenses to plaintiff, the balance to be paid over to S. But, if plaintiff should wish to sell the fixtures by auction or otherwise, S. undertook to allow him to do so on the premises, without his being liable to an action of trespass. S. also undertook to pay all arrears of rent and taxes within three months; and, in default of such payment, authorised plaintiff to sell the lease and fixtures on the premises by auction or otherwise, without previous mortgage, and to pay the proceeds as before stated. S. signed a receipt for 80*l.* as paid for purchase of the fixtures.

S. became bankrupt, having continued in possession of the house and fixtures until that event, and the bill having then three weeks to run. The assignees took possession of the fixtures and sold them.

Held, that plaintiff was entitled to recover the value from them, the agreement having vested in him an immediate interest in the fixtures.

The fixtures were sold by auction for 36*l.*, a fair price on such sale; but, if they had been valued as between outgoing and incoming tenant, they would have been worth 80*l.*

Held, that plaintiff was entitled to damages according to the latter estimate.

TRESPASS for taking fixtures, stoves, blinds, &c. Pleas: 1. Not Guilty. Issue thereon. 2. That the goods and chattels were not the plaintiff's, modo et formâ. Conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after Hilary term, 1846, the following facts appeared.

The fixtures were attached to a house and premises in the Strand, which were in the possession of William Smith, printer and stationer, under a lease. On 29th September, 1843, Smith drew a bill for 80*l.* on James King, payable to his own order six months after date, which King accepted. On the next day the plaintiff discounted this bill for Smith, and took by way of security a deposit of Smith's lease, with the following memorandum.

*102] "In consideration of Mr. William Thompson, of *18, Cecil Street Strand, discounting for me a bill of exchange," &c. (describing the bill), "I have this day deposited with him, as a collateral security for the due and punctual payment of the aforesaid bill of exchange, the lease of my house and premises, situate," &c., "and also have assigned to him the whole of the fixtures, as per inventory, in and about the said house and premises: and in the event of the said bill

of exchange being dishonoured and remaining unpaid for the space of seven days, I then, for myself, my executors and administrators, undertake and agree forthwith to execute unto the said W. T., his executors or administrators, a good and sufficient mortgage of all my estate and interest in and to the aforesaid lease, for repayment of principal and interest, such mortgage to contain the usual power of immediate sale; *together with the several fixtures in and about the said premises as per inventory annexed*, such lease and fixtures to be sold by auction or otherwise, and, after deducting the amount of the mortgage and all expenses whatsoever, the balance to be paid over to me: but, should the said W. T. wish to sell the said fixtures by auction or otherwise, I do hereby undertake to allow him or his agents to do so in and upon the said premises, without being liable to any action or actions of trespass or otherwise. And I further undertake to pay all costs, charges and expenses of and incidental to the said bill of exchange, and of such mortgage, such mortgage to be prepared by the solicitor of the said W. T., his executors or administrators. And I further undertake to pay all arrears of rent, rates, taxes and assessments whatsoever, within three calendar months less fourteen days after the same shall become due: and, in default *of my so doing, I hereby authorise the said W. T. to [*103 sell the said lease and fixtures on the said premises by auction or otherwise without my first executing a mortgage of the same, and to apply the proceeds thereof to the payment of the said bill of exchange and all expenses, and, after the same have been satisfied, to pay the balance over to me. As witness my hand, this 30th day of September, 1843."

An inventory of the fixtures was made out: and at the foot of this inventory Smith signed a receipt, bearing date 3d October, 1843, for 80*l.* as paid to him by the plaintiff for the purchase of the fixtures. Smith had paid 80*l.* to his lessor for the fixtures: and this was proved to be their value if sold by valuation between incoming and outgoing tenant.

On 4th March, 1844, Smith was adjudged a bankrupt, the bill having still more than three weeks to run. King, the acceptor, had become bankrupt before that time. Smith continued in possession of the premises and fixtures until his bankruptcy. The defendant Robins was appointed creditors' assignee of Smith's estate on March 29th, and caused the fixtures to be advertised for sale together with the bankrupt's stock. On May 27th, the plaintiff served the defendant Robins, the official assignee, and the solicitor to the fiat with a notice "not to sell or dispose of any of the fixtures in and about the house or premises No. 399, Strand, advertised for sale by you, the same having been mortgaged to me under an agreement bearing date on or about September last past;" and the notice stated the plaintiff's intention, in the event of such sale, to file a bill in Chancery for the specific performance of such agreement. Robins, however, caused the fixtures to *be sold by auction, by the [*104

defendant Pettitt as auctioneer, on the day appointed, when they brought the sum of 36*l.* 16*s.*, which was proved to be their fair value if sold in that manner.

On these facts a verdict was taken by consent for the plaintiff, damages 80*l.*, with leave to the defendants to move to enter a nonsuit, or to have the damages reduced from 80*l.*, the proved value of the fixtures between incoming and outgoing tenant, to 36*l.* 16*s.*, their proved value if sold by auction separate from the house. *Martin*, in the following term obtained a rule nisi accordingly.

Watson and *Corrie* now showed cause, and relied on *Boydell* v. *M'Michael*, 1 C. M. & R. 177, S. C. 3 Tyrwh. 974.

Martin and *Hoggins*, contrà. There is in the present case no mortgage of the term at law, as in *Boydell* v. *M'Michael*, but only an equitable deposit of the lease. As, therefore, no mortgage of the term was ever executed, the plaintiff must rely on a title to the fixtures independently of the house, in order to recover at law. This depends on the question whether the memorandum of agreement which is in evidence amounts to an absolute assignment of the fixtures. Some of the expressions used in the memorandum are inconsistent with each other: but taking the whole together it amounts to no more than a deposit of the lease, with an agreement to execute a mortgage of the house *and fixtures*, as a collateral security in the event of nonpayment of the principal secured. There

*105] was *clearly no intention to pass immediately the absolute property in the fixtures. And, if not, the whole can amount to nothing but an equitable mortgage. At the trial some reliance was placed on the inventory: but that inventory is only referred to in the memorandum as identifying the property, and not in such a manner as to render it, and the receipt at the foot, any part of the agreement. The memorandum must be looked at in itself. But, secondly, if the verdict is to stand for the plaintiff, it can only be for the amount at which the fixtures are valued, if they were to be sold separate from the house. The house remained in law the property of the bankrupt: the fixtures, by the supposition, had passed to the plaintiff under the assignment: the value which he can recover is only that of the property in which he had a legal interest.

Lord DENMAN, C. J. I am of opinion that the instrument, looked at in the whole, as we are bound to do where there are clauses at first sight inconsistent, amounts to an assignment of a present interest. As to the second question, the sale of the fixtures, separate from the house, was the act of the assignees, not of the plaintiff. They are not entitled to presume that the plaintiff would have sold in the same manner, or that he would not have sold them to the eventual purchaser of the term, which in the event of nonpayment he would be entitled to do. He is therefore entitled to claim the full value which he would have realised if he had sold in this manner.

PATTESON, J. I think it clear that the intention of the parties at the

time of the execution of this *document was to pass an immediate interest in the fixtures. This seems to me particularly evident from the last clause, which empowers the mortgagee to enter on the premises for the purpose of selling the fixtures without being liable to an action of trespass, plainly contemplating the property in the fixtures passing to the plaintiff while the legal interest in the house still remained in the bankrupt. As to the point of value, I think the assignee is not entitled to take the advantage of his own proceeding in separating the fixtures from the house. According to ordinary experience, it was most probable they would be sold with it. [*106

ERLE, J.,(*a*) concurred. Rule absolute.(*b*)

(*a*) COLERIDGE, J., had left the Court.
(*b*) Reported by H. Merivale, Esq.

ADDISON and CRICK *v.* J. R. GIBSON. *Feb.* 10.

A covenant whereby "A. B. and C., and any two of them jointly, and each of them severally," covenant with D. that A. B. and C., "or some or one of them," shall pay D. a sum of money is properly declared upon, in an action of covenant, against A. alone, as a covenant that A would pay that sum to D.

COVENANT. The declaration stated that, theretofore, to wit, on 31st March, 1840, by indenture made between Jane Gibson of the first part, William Gibson of the second part, the defendant J. R. Gibson of the third part, and the plaintiffs of the fourth part, defendant, for himself, his heirs, executors, administrators and assigns, covenanted with plaintiffs, their heirs, executors and administrators, that defendant, his *heirs, &c., would pay to plaintiffs or the survivor of them, his executors, &c., the sum of 1388*l.* 14*s.* 4*d.* on the 30th September then next, and until payment thereof, interest at 5 per cent. per annum, by equal half yearly payments without any deduction whatever: as by the said indenture, &c. Breach, that, although the said 30th September had elapsed long before the commencement of this suit, yet defendant has not as yet paid the said 1388*l.* 14*s.* 4*d.* or any part thereof, to plaintiffs or either of them, and that a large sum of money, to wit, the said sum of 1388*l.* 14*s.* 4*d.*, at the time of the commencement of this suit was, and still is, due and owing from defendant to plaintiffs. [*107

Pleas: 1. Non est factum. Issue thereon. 2. A plea of fraud, collusion, &c., which was traversed. Issue thereon.

On the trial, before ERLE, J., at the Bristol Summer assizes, 1845, the plaintiffs gave the indenture in evidence on the first issue. It appeared to be made between the parties named in the declaration: and, after reciting (inter alia) that defendant and Laura Jane Gibson were entitled to a reversionary interest in certain property expectant on the death of Jane Gibson (party of the first part), and that the plaintiffs had lent the

said Jane Gibson 1388*l.* 14*s.* 4*d.*, it contained a conveyance and assignment, by the defendant J. R. Gibson and Laura Jane Gibson to the plaintiffs, of such interest, by way of mortgage, to secure 1388*l.* 14*s.* 4*d.* with interest at 5 per cent. The following appeared to be the covenant on which the action was brought.

"And, for the consideration hereinbefore contained, the said W. Gibson, J. R. Gibson" (defendant), "and *Laura Jane Gibson, and any two of them, do hereby for themselves, their heirs, executors and administrators, jointly, and each of them doth hereby, for himself or herself, and his or her heirs, executors, administrators and assigns, severally, covenant with the said J. Addison and T. Crick" (the plaintiffs), "their heirs, executors, and administrators in manner following: that is to say that the said W. Gibson, J. R. Gibson" (the defendant) "and Laura Jane Gibson, or some or one of them, their or some or one of their heirs, executors, administrators or assigns, will or shall pay to the said J. Addison and T. Crick or the survivor of them, his executors or administrators, or their or his assigns, the sum of 1388*l.* 14*s.* 4*d.* on the 30th September next: and, until payment thereof, interest for the same at the rate of 5 per cent. yearly, by equal half yearly payments, without any deduction whatsoever."

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It was contended, for the defendant, that the proof varied from the declaration, inasmuch as the covenant was declared on as absolute, whereas it was in reality an alternative covenant, for payment by W. Gibson, or Laura Jane G. or the defendant, and should have been declared upon accordingly; as the defendant could not plead, to this declaration, payment by either of his two co-covenantors. No evidence was offered on the second plea. The learned Judge overruled the objection, but gave leave to move to enter a nonsuit. Verdict for plaintiff. A rule nisi having been obtained accordingly,

J. Greenwood now showed cause. This is a several covenant, and therefore properly declared upon *absolutely. But, if it were a joint covenant, that objection ought to have been pleaded in abatement; *Mountstephen* v. *Brooke*, 1 B. & Ald. 224; note (4) to *Cabell* v. *Vaughan*, 1 Wms. Saund. 291 *b*; *Cocks* v. *Brewer*, 11 M. & W. 51; *Whelpdale's Case*, 5 Rep. 119;(*a*) note (1) to *Eccleston* v. *Clipsham*, 1 Wms. Saund. 154 *b*.(*b*) That this may be treated as a several covenant also appears from *Lilly* v. *Hedges*, 1 Str. 553. In the same manner, in actions on a joint and several bill or note, the common practice is to declare against one of the acceptors without mentioning the others. In *Beaumont* v. *Greathead*, 2 C. B. 494, MAULE, J., said that payment, upon a joint and several note, by one of the makers alone, was made in discharge of each maker separately, and of all jointly, and might have been pleaded as a payment by each: the defendant would therefore be placed in no difficulty by this declaration. Here it was argued for

*109]

(*a*) See Co. Lit. 283 *a*.

(*b*) See 1 Chitty on Pleading (7th ed.), p. 53.

the defendant that non constat, on the face of the declaration, that this money has not been paid, although not by the defendant. But it is stated that the money is still due and owing from the defendant to the plaintiffs: this could not be, if another had paid: *Trever* v. *Nurse*, 2 Keb. 44. An objection, the converse of this, was taken in *Middleton* v. *Sandford*, 4 Campb. 34: the bond there was stated in the declaration to have been executed jointly by the defendant and two others; and, on the plea of non est factum, the defendant showed execution by himself alone of a joint and several bond: it was objected that this was a ground for nonsuit; but DAMPIER, J., said that the issue denied only the execution of the bond by the *defendant; and he overruled the objection. So in *Abbot* v. *Smith*, 2 W. Black. 947, DE GREY, C. J., says: "If non est factum is pleaded in an action brought against one obligor, proof of a joint obligor does not vitiate the action;" citing *Whelpdale's Case* and *Stead* v. *Moon*, Cro. Jac. 152. (He was then stopped by the Court.) [*110

Butt, *Taprell* and *Hawkins*, contrà. The question is, whether the covenant on which the plaintiffs are sued is stated on the record according to its legal effect, or not. Unquestionably it would be sufficient to declare on it according to its legal effect, without going further into the particulars. But here it is stated as absolute aud unconditional, whereas it is alternative, and therefore, according to *Penny* v. *Porter*, 2 East, 2, ought to have been so declared upon, as a similar covenant was in *Gillow* v. *Lillie*, 1 New Ca. 695. It is clear that, upon the covenant as stated in this declaration, debt might have been brought; *Evans* v. *Jones*, 5 M. & W. 295; but, if the covenant had been set out, as it really is framed, that is, in the alternative, an action of debt could not have been supported; *Harrison* v. *Matthews*, 2 Dowl. P. C. N. S. 318; unless indeed all had executed; and it could not be assumed that any covenantor, besides the defendant had executed; *Lilley* v. *Hedges*. And it would seem to follow, conversely, that, in order that covenant might lie (as it would have done in *Harrison* v. *Matthews*), the covenant should have been stated, namely, as it really is, as an alternative covenant. [*PATTESON, J. It seems to me that in *Harrison* v. *Matthews* the Court of Exchequer treated a covenant that A. and B. or one of them should pay as if it were a covenant that A. would pay if B. did not. If so, I should differ from them: for in the latter case an action would not lie against A. until B. made default: not so in the former.] [*111

Lord DENMAN, C. J. I am satisfied by the authorities cited by Mr. *Greenwood*.

PATTESON and ERLE, Js.,(*a*) concurred. Rule discharged.(*b*)

(*a*) COLERIDGE, J., had left the Court.
(*b*) Reported by H. Merivale, Esq.

Elliott v. *Thomas* was cited in moving.] That case, as to the point decided, is rather in favour of the plaintiff here than of the defendant. If the purchaser takes goods professedly for the purpose of examination, and keeps them a month, can it be said that he does not accept them? [WIGHTMAN, J. If the time were quite unreasonable, the plaintiff might perhaps treat the detention as an acceptance.] If so, there are circumstances under which an acceptance may be implied, though in fact not intended. But the question, whether or not the time of detention was reasonable, ought to go to the jury: if there was any evidence upon it, the Judge could not, on his own view of the subject, direct a nonsuit. [Lord DENMAN, C. J. You acquiesced in my manner of treating the case. When Mr. *Martin* applied for a nonsuit, I stated my view of the questions to be left to the jury, and reserved leave to move for a nonsuit if the finding upon them should be for the plaintiff. You did not desire to have the jury asked whether or not a reasonable time had elapsed.] The question actually put to them involved that. [Lord DENMAN, C. J. It was not in my mind. In what I stated, I certainly carried the doctrine, as to acceptance, a step farther than I ought. But, if I was wrong in not taking the opinion of the jury as to reasonableness of time, the only consequence is, that I did not put a question which they would have decided against you.]

*116] *Martin* and *Hugh Hill* were not heard in support of the rule.

PATTESON, J. My Lord Chief Justice went a step farther in his ruling than the authorities warrant.

COLERIDGE and WIGHTMAN, Js., and Lord DENMAN, C. J., concurred.

Rule absolute.

The QUEEN *v.* The Mayor, Aldermen and Burgesses of the Borough of BIRMINGHAM. *Feb.* 11.

In 1839, after a petition had been presented for a grant of quarter sessions to the borough of Birmingham, which had no gaol of its own, a negotiation was entered into between the town council and the justices of the county of Warwick, respecting the maintenance of borough prisoners in the county gaol and house of correction for one year; the county quarter sessions resolved that 11*d.* per day for each such prisoner would be a proper charge; and the council resolved that those terms should be acceded to; and such resolutions were entered in the books of the sessions, and on the minutes of the town council. Afterwards, in May, 1839, the borough obtained its grant of sessions. It was then proposed that a contract should be prepared containing the above terms; but none was prepared, in consequence of doubts as to the validity of the borough charter. Prisoners committed for trial at the borough sessions were conveyed to the county gaol, and there, or in the county house of correction, underwent their sentences. In September, 1839, an account was sent to the borough, charging for the maintenance of prisoners at 11*d.* each per day. In January, 1841, the county justices resolved that the borough justices had no jurisdiction to commit to the county house of correction; and such prisoners were detained till county justices attended to commit them. In September, 1842, another account was sent in on the above scale. In August, 1842, stat. 5 & 6 Vict. c. 98, passed, which provides (s. 18) that, where borough prisoners have been or shall thereafter be sent to county prisons, and no special contract shall be subsisting,

the borough shall pay to the county the actual expenses incurred in the maintenance, &c., of such prisoners.

Held that, in this case, there was no such special contract, and that the borough was liable for the actual expenses, which exceeded 11*d.* per head, of all borough prisoners, whether committed by county or borough justices.

Under stat. 5 & 6 Vict. c. 110, s. 4, the gaol of Coventry was purchased by the county of Warwick, out of the funds of the county.

Held, that the cost of such purchase was within stat. 5 & 6 W. 4, c. 76, s. 117, as incurred for a purpose other than the "prosecution, maintenance, and punishment," &c., of offenders committed for trial in the county; and therefore, that the borough of Birmingham, though it had a grant of separate court of quarter sessions, was liable as part of the county of Warwick for its proportion of the purchase money.

SIR F. KELLY, Solicitor General, in Michaelmas term, 1845, obtained a rule nisi for a mandamus to the defendants, commanding them to pay to the justices *in and for the said county of Warwick, or to the treasurer of the said county, 11,742*l.* 3*s.* 9*d.*, being the balance due from the council of the said borough to the treasurer of the said county for the expenses incurred in respect of the prosecution, maintenance and punishment, safe custody and care, of prisoners committed from the said borough to the county gaol of the said county, and the house of correction for the said county, since the grant of a separate Court of Quarter Sessions to the said borough, for offences which have arisen within the same; and also in respect of the proportion due from the said borough in respect of all sums of money expended out of the county rate, during the same period, for other purposes than the costs arising out of the prosecution, maintenance and punishment, conveyance and transport of offenders committed for trial in such county, and other than out of coroner's inquests, &c., and to make and levy such rate or rates within the said borough as may be necessary for raising the said sum for the purposes aforesaid. [*117

It was subsequently agreed between the justices of the county and the defendants that the points in dispute should be decided by the Court on the facts as stated in a case, and that the rule should be made absolute, discharged or modified as to the Court should seem reasonable, subject nevertheless to the right of either party, on the question herein further stated upon the construction of stat. 5 & 6 Vict. c. 110, intituled, "An Act to annex the county of the city of Coventry to Warwickshire, and to define the boundary of the city of Coventry," to take the judgment of a Court of Error by way of appeal from the decision of this Court. The following is an abridged statement of the case.

The district comprised within the borough of *Birmingham is situate within the county of Warwick, and, before the grant of a separate court of Quarter Sessions, as after mentioned, was liable to be rated to all rates laid upon the county of Warwick. [*118

At a special meeting of the council of the borough on the 8th March, 1839, a petition for a grant to the borough of a separate court of Quarter Sessions was agreed to; and a committee was appointed to treat with the county justices with a view to promote the objects of the petition.

There was not at this time, nor has there been since, any gaol or house of correction within the borough.

The justices of the county also, shortly after the above meeting, and before any grant of Quarter Sessions was made to the borough, appointed a committee to confer with the council of the borough on a proposal relative to the maintenance, &c., of the borough prisoners in the county gaol and the house of correction. This committee reported that 11*d.* per head, per day, would be the proper charge for the maintenance of each prisoner, for one year commencing with the date of the first commitment from the borough. The returns upon which the committee founded their report, recommending the scale of 11*d.* per day, did not include the expenses of repairs to the said prisons. Their report was confirmed at the Easter Quarter Sessions; and the resolution of the sessions was entered in the books of the clerk of the peace, and communicated to the town council of Birmingham. The borough committee reported also in favour of the charge proposed; and the town council resolved that the terms should be accepted; such resolution was entered in their minutes: and notice that the terms had been so accepted was communicated to the chairman of the Quarter Sessions for the county.

*119] *On 3d May, 1839, a separate court of Quarter Sessions was granted to the borough; and a copy of the grant, duly sealed with the corporate seal of the borough, was, in conformity with stat. 5 & 6 W. 4, c. 76, s. 112,(*a*) sent to the clerk of the peace of the county.

At the October Quarter Sessions for the county, held in the same year, it was ordered by the Court that a contract should be entered into with the council of the borough for the maintenance, in the county gaol and house of correction, of any prisoner committed thereto from the borough; and two justices of the county were thereby authorised to enter into a contract for that purpose(*b*) with the council of the borough, upon the terms agreed upon at the last Easter Quarter Sessions. It was then proposed to the town clerk of the borough that an order of the town council should be passed to authorise such a contract, and that a draft of the contract should be prepared.

In consequence, however, of objections having been made to the validity of the said grant to the borough,(*c*) no such order of the town council was passed.

A separate court of Quarter Sessions has, since the said grant, been regularly held for the borough. The prisoners committed to take their

(*a*) Stat. 5 & 6 W. 4, c. 76, s. 112, requires such copy to be sent within ten days after the grant, and provides that, after such grant, it shall not be lawful for the justices of the county to assess any lands, &c., within the borough to any county rate thereafter to be made, but that "Every part of every such borough shall thenceforward be wholly free and discharged from contributing, otherwise than is hereinafter provided, to any rate or assessment of any kind of and for the county in which any part of such borough is situated."

(*b*) See stat. 5 G. 4, c. 85, s. 1.

(*c*) See *Regina* v. *Boucher*, 3 Q. B. 641.

trial at the borough *sessions were conveyed to the county gaol for safe custody, and brought back again for trial at the borough sessions; and the prisoners there convicted have been reconveyed, at the expense of the borough, to the county gaol or the house of correction at Warwick to undergo their sentences. [*120

In September, 1839, the county treasurer transmitted to the town clerk of the borough an account for the maintenance of the borough prisoners, made out on the proposed scale of 11*d.* per head.

In consequence of the doubts as to the validity of the said grant, and the temporary inability of the town council to enforce the collection of their borough rates, no further accounts against the borough were delivered; nor was any demand made by the county treasurer until the year 1842, as after mentioned; although the borough prisoners were committed and sent to the gaol and house of correction of the county up to the Epiphany Sessions, 1841. At these sessions an order was made, denying the jurisdiction of the borough justices over the county house of correction, and prohibiting the reception of prisoners committed by such justices. The effect of this order was that the house of correction was closed against all prisoners committed by the justices of the borough; and the prisoners were obliged to be detained until county justices could be found to attend to commit to that prison; but the borough justices continued to commit prisoners to the county gaol for safe custody until their trials, when such prisoners were sent back to the county gaol or to the house of correction to undergo their sentences.

After the order of Epiphany Sessions, 1841, above mentioned, the justices of the borough ceased to commit *prisoners to the house of correction until the 18th October, 1842, hereinafter more particularly referred to. [*121

In September, 1842, the treasurer of the county delivered to the town clerk of the borough the accounts of the county against the borough for the maintenance of prisoners up to the month of June in that year. The accounts so delivered were not made out according to stat. 5 & 6 Vict. c. 98,(*a*) of the passing of which the *treasurer of the county was not then aware, but at the rate of 11*d.* per head per [*122

(*a*) Stat. 5 & 6 Vict. c. 98, "to amend the laws concerning prisons," enacts, sect. 15: "That in every such borough as aforesaid to which a separate court of sessions of the peace hath been or shall hereafter be granted, there shall be one common gaol and at least one house of correction, excepting those boroughs in which the mayor, aldermen, and burgesses, by their council, shall have contracted with the justices of the peace having authority or jurisdiction in or over any gaol or house of correction of the county, riding, or division wherein such borough is situated, or whereunto it is adjacent, or with the mayor, aldermen, and burgesses of some other borough in which there is a gaol or house of correction, or with the committee of a district prison, for the support and maintenance in such last-mentioned gaol or house of correction, or district prison, respectively, of any prisoners committed thereunto from such borough; and during the continuance of any such contract, but no longer, the first-mentioned mayor, aldermen, and burgesses shall not be bound to maintain any other gaol or house of correction for their borough; and it shall be lawful for the mayor, aldermen, and burgesses of any such borough, by their council, to enter into such contracts as aforesaid, although at the time of

day for each prisoner confined in the county gaol and house of correction.

In the same month the council of the borough referred it to a committee to confer with the magistrates of the county for the purpose of arranging for the future use of the county house of correction. A meeting afterwards took place between the mayor and one of the aldermen of the borough, and two of the visiting justices of the county prisons: and terms were then agreed upon for a future contract with the county for the maintenance of the borough prisoners, as well in the county gaol as in the house of correction. The committee reported to the council; and the council confirmed their report; and a draft of agreement was prepared by the town clerk, by which it was agreed that the borough should pay to the county, for the maintenance, &c., of borough prisoners thereafter to be committed to the county gaol and house of correction, the actual expenses incurred, to be ascertained according to the provisions of stat. 5 & 6 Vict. c. 98, s. 18: that the unsettled claim of the county against the borough for expenses theretofore incurred in the maintenance, &c., of prisoners committed to the county gaol for offences within the borough, subsequent to the grant of quarter sessions to the borough, and tried at the borough sessions or at the sessions of the county, *should be assessed and paid on the same principle; and that the expenses theretofore incurred in the maintenance, &c., of prisoners committed to the county house of correction should be assessed and paid in like manner. [*123

The proposed agreement was reported by the visiting justices of the county to the county justices at the Quarter Sessions held on 18th October; and the Sessions made an order confirming the same agreement.

In the following December the town clerk of the borough was applied to by the clerk of the peace for the maintenance accounts which had been previously delivered, as hereinbefore mentioned, on the scale of 11*d.* per head per day, in order that such accounts might be altered according to the terms of the last-mentioned agreement. The accounts were thereupon returned to the clerk of the peace, and altered accordingly,

entering into such contract there may be no gaol or house of correction belonging to such borough; and all enactments with respect to such contracts shall apply as well to those contracts where at the time of entering into the same there was or is a gaol or house of correction belonging to the borough, as to those contracts where there was or is no gaol or house of correction belonging to the borough at the time of entering into the same."

Sect. 18 enacts: "That in every borough to which a separate court of sessions of the peace hath been or shall hereafter be granted or purported to be granted, and where the persons committed for offences arising within such borough have been or shall hereafter be sent to any prison of the county in which such borough is situated, and that no special contract shall be subsisting between such borough and county relative to the said prisoners, the council of such borough shall pay or cause to be paid to the treasurer of such prison, or other person appointed by the justices of the peace in general or quarter sessions assembled, for the county in which such prison is situated, *the actual expenses heretofore incurred, or hereafter to be incurred*, in the conveyance, transport, maintenance, safe custody, and care of every such prisoner," according to the duration of the custody, at the average daily cost of each prisoner, &c.

and redelivered to the town clerk, with notice that the actual expense incurred in the maintenance, &c., of borough prisoners exceeded 11*d.* per head per day.

Payments on account had been made by the borough.

It was contended on the part of the county that the borough was liable to pay for the maintenance of all the prisoners theretofore committed to the county gaol and house of correction at the rate authorised by the 18th section of stat. 5 & 6 Vict. c. 98.

It was contended on the part of the borough that the borough was not liable to pay for any prisoners committed either to the house of correction or county gaol more than at the rate of 11*d.* per head per day; and that they were not liable to pay anything for commitments by county justices to the house of correction during the period above referred to when offenders committed by borough justices were refused at the said *house of correction by order of the county Court of Quarter Sessions. [*124

In the accounts against the borough, made out and delivered to the town clerk by the county treasurer, for its proportion of the general expenditure of the county from Epiphany Sessions to Midsummer Sessions, 1843, is a charge amounting to 2087*l.* 8*s.* 0*d.* for a proportion of the purchase money which the county of Warwick has paid or is liable to pay for the Coventry gaol, house of correction, county hall and other buildings, under and by virtue of stat. 5 & 6 Vict. c. 110, s. 4. The council of the borough contended that they were not liable to pay anything whatever towards the purchase of the said Coventry gaol. The justices of the county of Warwick contended that the council was liable.

The questions for the opinion of the Court were: Is the council of the borough of Birmingham liable to pay to the justices of the county of Warwick for the maintenance of all the before mentioned prisoners; and, if not, for what portion? And: Whether such payment is to be made after the rate of 11*d.* per head per day, or at the rate authorised by the 18th section of stat. 5 & 6 Vict. c. 98.

And whether the borough of Birmingham is liable to the payment of anything towards the purchase of the county gaol under stat. 5 & 6 Vict. c. 110, before stated.

Mellor, in support of the rule.(*a*) First. The borough of Birmingham is bound by stat. 5 & 6 Vict. c. 98, s. 18, *to pay the actual expenses incurred by the county in the maintenance, &c., of the borough prisoners. [*125 The case shows no contract, even in fact, that 11*d.* per head per day should be charged for each prisoner; but a negotiation only. The proceedings required by stat. 5 G. 4, c. 85, s. 1, as conditions of the ability to contract, were never duly taken. Moreover,

(*a*) The case was argued on 27th January in last term, and 11th February in this vacation, before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

until stat. 5 & 6 Vict. c. 98, passed, the borough was incompetent to make such a contract under stat. 5 G. 4, c. 85, because it had no gaol of its own; *Regina* v. *Justices of Lancashire*, 11 A. & E. 144. Now, indeed, sect. 15 of stat. 5 & 6 Vict. c. 98, seems to enable a borough without a gaol to make such a contract. But, even if there was a contract in fact, and the borough was competent to make one, it was not binding, because it was not authenticated by the common seal; *Regina* v. *Mayor of Stamford*, 6 Q. B. 433; *Arnold* v. *Mayor of Poole*, 4 Man. & G. 860. There is no pretence for contending that the borough is not liable in respect of those borough prisoners who were committed by county justices.

Secondly: The borough of Birmingham is liable to contribute towards the purchase of Coventry gaol under stat. 5 & 6 Vict. c. 110, s. 4. Before stat. 5 & 6 W. 4, c. 76, the borough was liable to its proportion of the whole county expenditure; and by section 117 of that act it is still liable in respect of sums "expended out of the county rate for other purposes than the costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial in such county, and, in the case of boroughs having a separate
*126] court of quarter sessions of the peace other than out of *coroner's inquests." The claim in question is not within these exceptions.

Hill contrà. It is clear that a contract, complete in all its terms, was made between the borough and the county, before the passing of stat. 5 & 6 Vict. c. 98; and section 18 of that statute is expressly restrained to cases where there is no subsisting contract. The contract in question has been acted upon; and an account, in conformity with it, has been furnished by the county. The contract is altogether silent as to the liability of the borough in respect of prisoners committed by county magistrates: and the law itself, independently of contract, imposes no such liability.

The expense of purchasing Coventry gaol is among the expenses excepted in stat. 5 & 6 W. 4, c. 76, s. 117. The enlarged meaning of the words "costs arising out of the prosecution, maintenance, and punishment" of prisoners is explained by *Regina* v. *Johnson*, 10 A. & E. 740, where it was held that these words were not confined to the mere personal expenses of prisoners, but that they included the whole expenses of the gaol, such as repairs, taxes and insurance. The exception comprehends all prison expenses: and it is immaterial to this point, whether the expenses are incurred in repairing and enlarging the existing gaol or in purchasing a new gaol as supplementary to the existing one. The intention of the legislature was, that, where a borough had a separate Court of Quarter Sessions, the borough and county should each separately bear its own prison expenses. The effect of section 112 is to take the borough out of the county for the purposes of liability to general expenses of the county: and the borough, to

become *liable to the special expense in question, must be brought back within the county by some express charge. [*127

Meller replied. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (February 25th), delivered the judgment of the Court.

This is an application for a writ of mandamus to the corporation of Birmingham to pay a sum of money to the justices of the peace of the county of Warwick. It appears, by the case stated by the parties, that a separate court of Quarter Sessions was granted to the borough on the 3d of May, 1839. The borough having no gaol, a negotiation was entered into prior to the grant of the court of sessions; and it was agreed, though not by any formal contract, that the sum of 11*d.* per day should be paid by the borough to the justices for each prisoner, and that the arrangement should continue for one year after a court of sessions should be granted.

From the time of the grant of the court of sessions it is clear that the borough could not be included in the county rate at all; 5 & 6 W. 4, c. 76, s. 112: but the borough remained liable under the 114th section for the expenses of prisoners tried at the assizes, and under the 117th section to its proportion of other county expenses. No provision is made in that act for the expenses of prisoners tried at the sessions, because the act contemplates that no grant would be made of a separate court of sessions until the borough had a gaol of its own.

After the grant to the borough, application was made *by the justices of the county to have a formal contract entered into; but, owing to doubts as to the validity of the charter of Birmingham, no such contract was entered into. Afterwards the act 5 & 6 Vict. c. 98, was passed, which provides, by section 18, that, when borough prisoners have been sent to the county prison, and no special contract shall be subsisting between such borough and county relative to the said prisoners, the council shall pay the actual expenses heretofore incurred or hereafter to be incurred. [*128

Both parties treated this section as applicable to their case, as appears by the draft of agreement of the 18th October, 1842, set out in the case, in which it is distinctly provided that the actual expenses shall be paid both prospectively and retrospectively; and accordingly an account which had been sent in by the county treasurer to the borough, charging at 11*d.* per head, was altered so as to charge the actual expenses.

We cannot, therefore, entertain any doubt that the actual expenses ought to be charged, and not the proposed sum of 11*d.* per head, as to which no contract, even for a year, was distinctly made. But it appears that, owing to a resolution of the county Epiphany Sessions, 1841, the county house of correction was closed as to prisoners committed by the borough magistrates, and that expense and inconvenience were incurred by the borough in procuring the committal of such prisoners by county

magistrates; and it is contended that the borough ought not to pay for such prisoners. Now, by the operation of the statute 5 & 6 W. 4, c. 76, it is clear that the borough could not be made even to contribute to the expenses of prisoners committing offences in the borough and committed to the *county prison, other than such as were tried at the assizes; but that act contemplated that prisoners for the assizes only would be sent from the borough to the county prison. If, therefore, we were to hold that the borough ought not to pay for the prisoners whom we are now considering, we should throw upon the county expenses of which it was intended by the act 5 & 6 W. 4, c. 76, that they should not bear one farthing, and for the payment of which by the borough the act 5 & 6 Vict. c. 98, s. 18, has expressly provided.

*129]

Therefore we think that the deduction claimed by the borough cannot be allowed, and that the actual expenses of all the prisoners sent from the borough, whether by magistrates of the borough or the county, must be borne by the borough.

The other question submitted to us by the case arises under the act 5 & 6 Vict. c. 110, s. 4, which obliges the county of Warwick to pay the city of Coventry the fair value of the gaol and house of correction and court house at Coventry. Now the 117th section of stat. 5 & 6 W. 4, c. 76, makes the borough of Birmingham contributory to the county rate of Warwickshire "for other purposes than the costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial in such county," and out of coroner's inquests.

It is contended that the purchase money of the gaol and court house of Coventry is within the fair meaning of those words. It certainly seems very hard that the borough of Birmingham should be bound to contribute towards the purchase of buildings from which, in all probability, it never can derive any benefit: but we cannot bring the case within the words of the section *above cited. Neither do we think that the borough of Birmingham is so entirely separated from the county of Warwick in respect to prisoners as to justify us in reading stat. 5 & 6 Vict. c. 110, as if, in using the words "the county of Warwick," the legislature intended "the county of Warwick except the borough of Birmingham." We are constrained therefore to hold that the borough of Birmingham is liable to contribute its proportion of the sum to be paid under stat. 5 & 6 Vict. c. 110, and which is to be levied under the provisions of stat. 5 & 6 W. 4, c. 76, s. 117.

*130]

Judgment for the Crown.(a)

(a) Reported by H. Davison, Esq.

DOE on the demise of JACOBS *v.* PHILLIPS and Others. *Feb.* 12.

In 1767 the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H. to attend the inheritance. In 1844 the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defendants also claiming it under title derived through H. The owner of the legal interest in the term had never been in possession. No demand of possession had been made before action brought.

Held, that the action was not maintainable; for if a tenancy at will existed, as between the trustee and cestui que trust, it had not been determined by demand of possession, and, if no tenancy existed such as to render necessary a demand of possession, then the action might have been brought twenty years before, and was, consequently, barred by stat. 3 & 4 W. 4, c. 27, ss. 2, 3.

EJECTMENT for certain undivided shares of a messuage and lands in Kent. The declaration was of Easter Term, 7 Victoria.

On the trial, before Lord DENMAN, C. J., at the Maidstone Spring assizes, 1846,(*a*) it appeared that, in 1766, the owner in fee of the premises had mortgaged them to one Hubbard for a term of 500 years. In the following year Hubbard became the absolute purchaser in fee; and the residue of the term was at the same time *assigned to one Holyhead (since deceased), in trust for Hubbard, and to attend the inheritance. A limited administration of this term as part of the goods of Holyhead had been taken out by the lessor of the plaintiff in 1843: and he brought this ejectment on behalf of infants, who claimed title, through Hubbard, to the beneficial interest in four ninths, undivided shares, of the property, their title being denied by the defendants, who also claimed through Hubbard. Holyhead had never been in possession; nor had Hubbard, before he became owner in fee. [*131

The defendants objected that the right of entry was barred by stat. 3 & 4 W. 4, c. 27, s. 2.(*b*) His lordship directed a verdict for the plaintiff, and gave the defendants leave to move to enter a nonsuit.

Gurney, in Easter term last, obtained a rule nisi accordingly.

Whitehurst and *Wordsworth* now showed cause. The doctrine of non-adverse possession having been in effect abolished by stat. 3 & 4 W. 4, c. 27, ss. 2, 3 (*Nepean* v. *Doe dem. Knight*, 2 M. & W. 894; *Culley* v. *Doe dem. Taylerson*, 11 A. & E. 1008, 1015), the question is whether this action was commenced within twenty years next after the time at which the right *to bring such action first accrued to the lessor of the plaintiff or to some person through whom he claims, within the meaning of the second section of that statute. The third section explains at what time the right of action shall be deemed to have first [*132

(*a*) A previous trial of this ejectment had taken place in 1844.

(*b*) They also objected that, as the term had not been noticed since 1767, it must be taken to have been surrendered; or, if not, that it had been put an end to by stat. 8 & 9 Vict. c. 112. His Lordship left it to the jury to say whether they thought the term had been surrendered, but told them he was of opinion that there was no ground for the presumption. The jury found that the term had not been surrendered. A rule nisi for a new trial was obtained on this point: but, as it became unnecessary for the Court to pronounce any opinion upon it, this part of the argument is not reported.

had used the premises in an untenantlike manner. The third count was the ordinary indebitatus count for use and occupation.

Pleas. 1. To the whole declaration, Non assumpsit. 2. To the first count, a traverse of the alleged tenancy. 3. To the first count, performance. 4. To the second count, a traverse of the alleged tenancy. 5. To the second count, performance. Issues were joined on these pleas.

On the trial, before ALDERSON, B., at the Sussex Spring assizes, 1846, the following facts appeared. Previously to 18th March, 1844, the premises were held by the plaintiff and one Richardson, as customary tenants of the manor of Robertsbridge in Sussex, the plaintiff being entitled to

*136] two eighth shares in his own right, and to six eighth *shares as tenant in common with Richardson. On the day above mentioned, Richardson, without the knowledge of the plaintiff, by writing not under seal, made between himself of the one part and the defendants of the other part, let the premises to the defendants for one year, from 15th May, 1844, till 15th May, 1845, at a yearly rent therein reserved, payable to himself half yearly on 15th November, 1844, and 15th May, 1845, the defendants to keep the interior of the premises in tenantable repair. The lease contained an undertaking on the part of Richardson, "his heirs, executors, administrators and assigns," for quiet enjoyment by the defendants. In the first half year of the tenancy Richardson sold his interest in the premises to the plaintiff, who was admitted thereto on 30th September, 1844.

To prove the plaintiff's ownership, copies of four of the court rolls of the manor of Robertsbridge were put in evidence. These documents, the first of which was dated in 1834, respectively showed the surrender to the plaintiff and Richardson of six eighths of the premises, and their admittance thereto, then two separate surrenders of each of the remaining two eighths to the plaintiff alone, and his admittance; and, lastly, the surrender by Richardson of his interest to the plaintiff, and the plaintiff's admittance accordingly. In all these instruments the premises were described as customary tenements holden of the manor of Robertsbridge. All the surrenderors were proved to have been in possession. No other evidence was given to show the existence of such a manor, or that the premises were so holden.

At the time of the sale by Richardson to the plaintiff, they signed a

*137] joint authority to one Smith to receive *the rent up to 29th September, 1844. On 6th December, Smith, in pursuance of this authority, applied to one of the defendants for the half year's rent due on 15th November. The authority was produced; and the defendant read it, and paid the rent. Smith then stated that a portion of the rent so paid, reckoning to 29th September, would be equally divided between the plaintiff and Richardson, and that the remainder thereof and also the following half year's rent would be paid to the plaintiff alone, as he had become the sole owner from that day. Smith also gave a receipt:

the receipt was for half a year's rent received by the plaintiff and Richardson, without stating the proportion to which each was entitled. The following half year's rent was not paid: and this action was brought to recover it, and also to recover damages for non-repair of the premises.

It was objected that the plaintiff could not maintain the action: that, in the first place, he had not shown himself to be assignee of the reversion, inasmuch as the copies of court rolls were not evidence to prove either that there existed such a manor as Robertsbridge, or that the premises were customary tenements within it; and, secondly, even if he had shown himself to be assignee of the reversion, he could not sue on a promise made to another person. The learned Baron ruled in favour of the objections, and directed a verdict for the defendants on all the issues except the third and fifth, and on the third and fifth issues for the plaintiff.

Bovill, for the plaintiff, in Easter term last, obtained a rule to show cause why a new trial should not be had on the ground of misdirection.

**Shee*, Serjt., and *Bramwell* now showed cause.(*a*) The written contract was made with Richardson; and the plaintiff could not [*138 sue upon it; and there was no evidence of any new contract between the plaintiff and the defendants. Stat. 32 H. 8, c. 34, s. 1, applies to leases by indenture only: per PARKE, B., in *Buckworth* v. *Simpson*, 5 Tyr. 344, 354; S. C. 1 C. M. & R. 834. Perhaps the plaintiff might maintain debt for use and occupation; but he cannot maintain assumpsit. The count for use and occupation alleges in the usual form that the occupation was by the "sufferance and permission" of the plaintiff. This was disproved by the evidence. [Lord DENMAN, C. J. Stat. 11 G. 2, c. 19, s. 14, gives the action to the "landlord," and says nothing about "sufferance and permission."] When Richardson demised, he was entitled to three eighths; and by estoppel against the defendants he had good title to the remaining five eighths: if he sued on the agreement, the defendants would have no answer. No arrangement between Richardson and the plaintiff can be forced on the defendants so as to affect their original tenancy. It did not appear that the plaintiff was landlord; for there was no evidence that the premises were copyhold. [COLERIDGE, J. The copies of court rolls showed that the premises had been dealt with as part of the manor: Richardson was in possession.] As to any new contract with the plaintiff, a new tenancy could not arise unless the old tenancy had been surrendered. In *Brydges* v. *Lewis*, 3 Q. B. 603, 605, the suggestion of a new tenancy was made for the purpose of supporting a similar action; and PATTESON, J., asked, "What *consideration could there be from the plaintiff, who had no [*139 power to turn the defendant out?" That question may be asked in the present case. In *Buckworth* v. *Simpson* the plaintiff, who stood

(*a*) Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

in the place of the original lessors, was entitled to give the lessees notice to quit, so that there was ground for presuming a new contract. The evidence of what passed between one of the defendants and the witness Smith could show no more than an acknowledgment of title, which cannot be construed into a surrender. [PATTESON, J., referred to *Lumley* v. *Hodgson*, 16 East, 99.]

Bovill and *Wise*, contrà. Actions by the assignee of the reversion are in some cases maintainable at common law: per BAYLEY, J., in *Vyvyan* v. *Arthur*, 1 B. & C. 410, 414. [PATTESON, J. How can one man sue in assumpsit on another's agreement? It must be debt.] That is not stated to have been so in *Lumley* v. *Hodgson*, 16 East, 99, which is a strong case, for the assignee was allowed to recover, although the rent had been already paid to the lessor. That case shows also that since stat. 4 Ann. c. 16, s. 9, an action for use and occupation is maintainable by the assignee without attornment; and stat. 11 G. 2, c. 19, s. 14, gives this form of action, and gives it to the landlord, that is to the owner. *Birch* v. *Wright*, 1 T. R. 378, and *Rennie* v. *Robinson*, 1 Bing. 147, are authorities for the present action. In *Mayor, &c., of Newport* v. *Saunders*, 3 B. & Ad. 411, it was objected that the plaintiffs as owners of a market could not maintain assumpsit for stallage, for that
*140] the owner of a market *had no option to refuse the standing of a stall to any one, and so there was no implied contract, in which respect the action differed from assumpsit for use and occupation. But LITTLEDALE, J., said: "Assumpsit lies for the use and occupation of premises at the suit of the owner. Now stallage is a satisfaction to the owner of the soil for the liberty of placing a stall upon it. If assumpsit be maintainable in the one case, there is no reason it should not in the other." The copies of court rolls were evidence that the premises were copyhold. [Lord DENMAN, C. J. We are of that opinion.] There was also evidence of a new tenancy between the plaintiff and the defendants. [PATTESON, J. I think the evidence could amount to no more than an acknowledgment of title.] The effect of the evidence was for the jury; it amounted to an estoppel, as in *Dolby* v. *Iles*, 11 A. & B. 335; for the defendants paid rent to the plaintiff as their landlord. [*Bramwell*. In the judgment of BULLER, J., in *Birch* v. *Wright*, 1 T. R. 378, 387, it is said: "The action for use and occupation is founded on contract; and, unless there were a contract either express or implied, the action could not be maintained."] *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (February 25th), delivered the judgment of the Court.

In this case, the plaintiff being entitled to five eighths, and one Richardson to three eighths, of certain copyhold premises, Richardson, by lease in writing, not under seal, demised them to the defendants in
*141] his own name for one year, at a rent payable half yearly, and under certain terms of repairing. Before the first half year's *rent

became due, Richardson surrendered his interest to the plaintiff, of which the defendants had notice, and afterwards paid the half year's rent to an agent employed both by Richardson and the plaintiff.

The present action is for non-repair, and for use and occupation, to recover the last half year's rent; and a verdict was found for the defendants. It was objected, at the trial, that no evidence was given of the existence of a manor of which the premises were copyhold. But surrenders purporting to be copies of the rolls of the manor, and which were admitted under a Judge's order, were given in evidence, and, we think, were abundant evidence on that point.

With regard to repairs, it was objected that stat. 32 H. 8, c. 34, applies only to cases of demise by deed, and that the assignee of the reversion cannot sue in assumpsit on the contract made by the assignor. We are entirely of this opinion, and that the verdict on the first count is right. So on the second count, which is on an implied contract to repair arising out of the relation of landlord and tenant. No such implied contract arises where the tenant holds under an express contract which provides for the very matter. Therefore, the verdict on the second count is also right.

The count for use and occupation requires more consideration. No doubt the plaintiff was landlord during the time that the rent in question accrued, and when it became due, and was entitled to receive it. He might have distrained for it, supposing the tenancy to have continued; or he might have brought an action of debt for it. But the question is, whether an action of assumpsit will lie, in which he states that the defendants occupied by his sufferance and permission. It was said that a new tenancy might be inferred when the *defendants had notice of the surrender to the paintiff; but there is no ground whatever [*142 for any such inference. It is quite plain that the defendants held under the lease made by Richardson, and under that alone, and the plaintiff could not have prevented them from so holding. The permission to occupy emanated from Richardson, the grantor of the lease, and was complete when the lease was executed, and never could emanate from the person who subsequently became assignee of the reversion; unless, indeed, Richardson having granted for himself and his assigns, the permission of any person who might become assignee of the reversion during the lease can be said to be virtually included, so that the occupation became in point of law permissive on the part of the assignee as soon as his interest took place. We think that this is the right view of the case, and that, the occupation being in point of law by the permission of the plaintiff, the action is maintainable in its present form by virtue of the statute 11 G. 2, c. 19, s. 14. In most of the cases referred to on the argument the tenancy was from year to year. It is obvious that the assignee of the reversion has then the power of determining the tenancy by notice; and, if he refrains from so doing, the

occupation may well be said to be by his permission. In *Lumley* v. *Hodgson*, 16 East, 99, the tenancy was from year to year, and a notice to quit had actually been given, but not persevered in. The action was for a year and a half's rent: the last year's rent all accrued after the expiration of the notice to quit: and the occupation during that time was clearly by the permission of the plaintiff; the first half year not so; and the same question might have arisen as in the present case; but it
*143] was not made. In **Mortimer* v. *Preedy*, 3 M. & W. 602, the Court felt the same difficulty as arises here; but the point was not expressly determined. The case of *Buckworth* v. *Simpson*, 1 C. M. & R. 834, S. C. 5 Tyr. 344, was also upon a tenancy from year to year: so was the case of *Dolby* v. *Iles*, 11 A. & E. 335, which however turned upon the defendant being estopped by his own acts of recognition. No case appears yet to have been determined, where, an absolute lease in writing, not under seal, for a fixed term of years, having been granted, and the landlord having assigned his reversion, it has been held that the assignee can maintain an action of assumpsit for use and occupation. We are however of opinion, for the reasons already given, that he can; and we think that the direction of the learned Judge on this part of the case was wrong, though right as to the question of repair.

The rule must be absolute for a new trial. Rule absolute.(*a*)

(*a*) Reported by H. Davison, Esq.

KINE *v.* EVERSHED. *Feb.* 12.

In trespass for false imprisonment, it appeared that plaintiff had been given in charge to a constable by defendant without warrant, for doing malicious injury to a house. Defendant was attorney to the owner of the house, and alleged that he had acted under stat. 7 & 8 G. 4, c. 30, ss. 24, 28, and was entitled to notice of action under sect. 41. The Judge asked the jury whether the defendant had acted bonâ fide, and on their answering in the affirmative, nonsuited the plaintiff for want of notice.

Held, that the jury should have been asked (with reference to section 28, which enacts that persons found offending may be apprehended without warrant "by the owner of the property injured, or his servant, or any person authorised by him") not only, generally, whether the defendant acted bonâ fide, but whether he had a reasonable belief that he was the owner's servant or had his authority.

TRESPASS for assault and false imprisonment. Plea. Not guilty (by statute). Issue thereon.

*144] On the trial, before ALDERSON, B., at the Spring assizes *for Sussex, 1846, the defendant justified under the Malicious Trespass Act, 7 & 8 G. 4, c. 30, which (sect. 28) enacts that any person found offending against the act "may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice," &c. The plaintiff had mortgaged a dwelling house, of which he was tenant and occupier, to one

Goodman; the defendant was an attorney who had prepared the mortgage; and he also acted generally as attorney for Goodman. The mortgage money being due and unpaid, disputes had arisen between Goodman and the plaintiff; and, the plaintiff having quitted the house for a few days, Goodman had forcibly obtained possession. The plaintiff some time afterwards returned with workmen, and was engaged in pulling down a part of the house, for the purpose of completing some alterations, which he had commenced before quitting the house, when the defendant came up with a constable, desired the plaintiff to desist, and, on his refusing to do so, gave him into custody. The defendant claimed a nonsuit, because no notice of action had been given, as required by sect. 41. The plaintiff in answer relied on the proviso, in sect. 24, "that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of," and also contended that the defendant had not brought himself within sect. 28, as owner, servant, or person authorised by the owner. The learned Judge asked the jury whether the defendant, in directing the apprehension of the plaintiff, had acted *bonâ fide or not, and, on the jury answering that the defendant had acted bonâ fide, nonsuited the plaintiff. *M. Chambers*, in Easter term last, obtained a rule nisi for a new trial, on the grounds, that the defendant was not entitled to notice of action, inasmuch as the plaintiff was protected by the proviso of sect. 24, and that the defendant neither was a person authorised by the act to direct the plaintiff's apprehension without warrant, nor had any reasonable ground for believing that he was so authorised. [*145

Creasy now showed cause.(*a*) The fact of the plaintiff acting "under a fair and reasonable supposition that he had a right to do the act complained of" is immaterial; for the defendant would be entitled to notice of action if he bonâ fide believed that the plaintiff did not act under such supposition. [Lord DENMAN, C. J. That point may be passed over for the present: the bona fides of the plaintiff would be material by way of answer to the charge before the magistrate; but it is difficult to understand how the party making the charge would therefore have no right to notice of action.] The next objection is that the arrest was unauthorised, as the defendant was not "the owner of the property injured," nor "his servant," nor a "person authorised" by the owner, within sect. 28. But the defendant had acted as attorney for the owner in the mortgage transaction, and was also his attorney at the time in question: and *Cann* v. *Clipperton*, 10 A. & E. 582, is decisive to show that an attorney may direct such an arrest. And, whether or not the defendant was servant to or *authorised by the owner, the defendant was entitled to notice if he believed himself to be within the act, and had reasonable ground for so believing. (He was then stopped by the Court.) [*146

(*a*) Before Lord DENMAN, C. J., PATTESON and WIGHTMAN Js.

M. Chambers, contrà. First, to justify the apprehension without warrant, it was necessary for the defendant to show that an offence within the act was committed; and also that the offender was not within the proviso of sect. 24. Secondly, the defendant was not servant of the owner. The word "servant," in sect. 28 of the statute, is used in the ordinary sense, and would comprehend the domestic and farm servants of the owner, but not his attorney. Nor was the defendant a "person authorised" by the owner. All that appeared was, that the defendant had acted as attorney for Goodman on the occasion of the mortgage, and that about the time in question he was also Goodman's attorney, that is an attorney whom Goodman was in the habit of employing when he happened to require legal assistance. No general authority to the defendant to manage and look after the property was proved, even if such general authority would be sufficient. By sect. 9 of stat. 5 & 6 W. 4, c. 59, which imposes penalties for cruelty to horses, any peace officer, or the owner of the animal ill treated, may, upon view or information of the offence, apprehend the offender without warrant: and, by sect. 19, in all actions for any thing done in pursuance of that act notice of action is necessary. In *Hopkins* v. *Crowe*, 4 A. & E. 774, it was held that the defendant, who was not the owner of a horse, which had been ill treated, but merely the son of the owner, and had

*147] *apprehended the plaintiff without warrant, was not entitled to notice, although he intended bonâ fide to act under the statute. *Edge* v. *Parker*, 8 B. & C. 697, which was an action against the assignee of a bankrupt for entering the house of a third person to seize the bankrupt's property, is also an authority showing that the mere bonâ fide intention to act in pursuance of a statute will not entitle a person to notice of action. Here it was not left to the jury to say whether the defendant had Goodman's authority. Persons filling a specified character are entitled by stat. 7 & 8 G. 4, c. 30, to apprehend without warrant; a person filling the specified character may be entitled to notice, if he has acted bonâ fide, notwithstanding his excess or mistake; but no other person is so entitled. [WIGHTMAN, J. Suppose it were necessary to plead that the defendant was entitled to notice, and that none had been given, how would the defendant have pleaded so as to show that he ought to have had notice? *Creasy*. He might have pleaded that Goodman was owner, and that he himself was his servant or authorised by him, or that he reasonably believed Goodman to be the owner, and himself to be his servant or authorised by him. In *Hughes* v. *Buckland*, 15 M. & W. 346, where defendants, as the servants of a person having a several fishery, apprehended the plaintiff, who was fishing beyond the limits of the fishery, they were held entitled to notice under stat. 7 & 8 G. 4, c. 29, ss. 35, 63, because they reasonably believed that the place in question was within the fishery.] It would be a dangerous doctrine that protection given by statute to a definite class of

persons will extend to any one *who may be thought to have [*148] reasonably believed himself within that class. In *Hughes* v. *Buckland*, the defendants filled the statutory character to which the authority was intrusted, and merely made a mistake of place. The jury here were not even asked whether the defendant reasonably believed himself to have been authorised by Goodman;(*a*) and surely the defendant could not be entitled to notice unless he acted on a reasonable belief of his authority. A person may bonâ fide, but without any reason, believe himself to be a magistrate authorised to exercise a particular jurisdiction; but his bona fides will not entitle him to notice of action.

Creasy. Whether or not a person has reasonable ground for supposing a case to come under a statutory authority with which he is invested may be a question for the Judge, as probable cause has been held to be in an action for indicting maliciously and without probable cause; *Panton* v. *Williams*, 2 Q. B. 169. But it has been frequently held that bona fides is all that it is necessary for a jury to find, in order to entitle a defendant to notice of action; *Rudd* v. *Scott*, 2 Scott, N. R. 631; *Reed* v. *Cowmeadow*, 6 A. & E. 661; *Wedge* v. *Berkeley*, 6 A. & E. 663.(*b*)

Cur adv. vult.

Lord DENMAN, C. J., on a subsequent day in this vacation (February 25th), delivered the judgment of the Court.

*This was an action for assault and false imprisonment. The defence was on stat. 7 & 8 G. 4, c. 30, sects. 24 and 28. The [*149 plaintiff had been taken into custody by the defendant's order as a wilful and malicious trespasser to the house of which he himself was tenant. The defendant was attorney for the mortgagee of the house; and, seeing the plaintiff mounted on a ladder, and proceeding to take off the roof, had called on a policeman to arrest and take him before a justice of the peace, who dismissed the charge. When the plaintiff had closed his case, the defendant claimed a nonsuit, for want of previous notice of action. The learned Judge took the opinion of the jury whether the defendant acted bonâ fide in apprehending the plaintiff or whether the charge was colourable; and, on their finding that he acted bonâ fide, directed a nonsuit. We granted a rule to show cause why the nonsuit should not be set aside, and the case go down again to trial.

The 41st section, "for the protection of persons acting in the execution of this act," requires "notice in writing of such action, and of the cause thereof, one calendar month at least before the commencement of the action." The defendant, however, is said not to be a party who was acting in the execution of the act, because he was neither the owner of the house, nor the owner's servant, nor acting by the owner's authority in arresting the plaintiff; good reasons, undoubtedly, for holding, that a party so arresting could not justify under the act, but not necessarily

(*a*) See *Hazeldine* v. *Grove*, 3 Q. B. 997, 1007.
(*b*) See the judgments in *Cann* v. *Clipperton*, 10 A. & E. 582, 588, 589.

sufficient for dispensing with that notice which is requisite for the protection of those who assume to carry it into execution. Thus in *Cann*
*150] *v. *Clipperton*, 10 A. & E. 582, where an attorney had directed the apprehension of persons injuring the property of his client, the jury having found that the defendant acted as the owner's servant, and bonâ fide on the belief that this proceeding was warranted by the statute, the Judge reserved leave to move for a nonsuit, no notice having been given; and this Court held the defendant to be entitled to one. That case is very like the present in its circumstances. Again, the Court of Exchequer held the servant of the owner of a fishery to be entitled to notice, where he had arrested the plaintiff, though not trespassing within the limits of the fishery, and therefore wholly beyond the jurisdiction, when it appeared that he bonâ fide believed the plaintiff to have been within it.(*a*) In a former case, of *Hopkins* v. *Crowe*, 4 A. & E. 774, I refused to ask the jury whether the defendant had acted bonâ fide, inasmuch as he filled no one of the characters empowered by the act then in question to take parties into custody.

And these cases seem to draw the distinction, which has frequently been pointed out, that a general persuasion that the defendant had the power he claimed to exercise will not entitle him to notice; but a mistaken opinion on any of the facts which must exist to give him that power will not deprive him of the right to notice. Thus, in *Cann* v. *Clipperton*, the defendant was found to have acted as his client's servant, and to have acted bonâ fide; and in *Hopkins* v. *Crowe*, the defendant could not have supposed himself to be the owner of the horse, and the act did not give any power to the servant of the owner to arrest. But
*151] in the *present case the jury were asked whether the defendant acted bonâ fide, or whether, on the other hand, his proceeding was malicious and colourable, no question having been put to them as to his being the servant of or having the authority from the mortgagee, or reasonably believing himself to be in either of those positions. Now, if this were held sufficient, the numerous cases in which the courts have required that the defendant's belief should be not only real, but reasonable, must be overruled. And general bona fides, or rather the absence of proof of mala fides, would mischievously lessen the obligation which parties, invading the rights of others, are under to use caution in their proceedings. We have on several occasions expressed our opinion that it was necessary for defendants to show, not merely that vague opinion of their own power, but a reasonable conviction that they were enforcing the specific provisions of the law in committing the grievance complained of.

We think that the question was left to the jury imperfectly; that they should have been asked, not only as to the bona fides of the defend-

(*a*) *Hughes* v. *Buckland*, 15 M. & W. 346.

ant, but as to his reasonable belief that he was servant of or had the authority of the mortgagee.

The rule for a new trial must be made absolute. Rule absolute.(*a*)

(*a*) Reported by H. Davison, Esq.

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*SOPHIA DE MEDINA *v.* GROVE, WEYMOUTH, and RIGHY. [*152

THE SAME *v.* GROVE.

No action lies against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved.

Money levied by a regular execution, under a judgment valid on the face of it, cannot be recovered back in an action for money had and received on the ground that judgment was signed, or execution issued, fraudulently, for the whole sum named in the judgment, when part had been already paid.

The remedy, in case of such fraud, is by motion to the Court in which the action was brought, to set aside the judgment or the execution.

IN *De Medina* v. *Grove and Others*, the action was on the case. The first count alleged that, before the committing, &c., to wit, on 3d October, 1842, one Patrick Strachan recovered a judgment, in the Common Pleas, against plaintiff for 1060*l.* 10*s.*, for breaches of certain covenants: that afterwards, and before the payment next after mentioned, all the right, title, &c., of Strachan in and to the said judgment, and the money due and payable by virtue thereof, and all the benefit, &c., thereof, by assignment thereof theretofore made by Strachan, came to and vested in defendant Grove, who then, and from thence until and at the time of the committing, &c., became and was entitled to the said damages. That, before the time of committing, &c., divers large sums of money, amounting, to wit, to 1000*l.*, had been paid to and received by Grove, by and on behalf of plaintiff, on account and in part satisfaction of the said damages; all which defendants Weymouth and Righy, at the time of the committing, &c., well knew. That, before and at the time of the committing, &c., the last mentioned defendants carried on the business of attorneys in copartnership, and, as such attorneys, they, acting for and on behalf of Grove, caused to be issued out of the *said Court, upon and for having satisfaction of said judgment, [*153
a certain writ, &c. (describing a ca. sa. against plaintiff, directed to the sheriff of Middlesex), to satisfy Strachan the said sum of 1060*l.* 10*s.*, so, as aforesaid, recovered, with interest, &c. Yet defendants, well knowing the premises, but intending to injure, &c., the plaintiff, afterwards, to wit, "on 8th March, 1843, wrongfully and injuriously caused the said writ to be indorsed" with a direction to the sheriff to levy the whole of said sum of 1060*l.* 10*s.*, and interest as aforesaid, and then "wrongfully and injuriously caused" the said writ, so indorsed, to be

delivered to the said sheriff to be executed; and "wrongfully and injuriously caused" plaintiff to be, and plaintiff was afterwards, to wit, on, &c., under and by virtue of the said writ, taken and imprisoned by the said sheriff for a long space of time, to wit, one day, and until plaintiff executed and delivered, and plaintiff was, by force and duress of such imprisonment, afterwards, to wit, on, &c., forced and obliged to, and did then, execute and deliver to defendants certain securities, to wit, a certain warrant of attorney, &c., described in the count to be given on behalf of plaintiff and one Henry Augustus De Medina, to confess judgment for 2164*l.* and costs, at the suit of Grove, with a defeasance declaring it to be given to secure to Grove 1081*l.* 14*s.* 2*d.*, for which sum, with interest, costs, &c., Grove if he entered up judgment might sue out execution: and also a memorandum of agreement, whereby the plaintiff and H. A. De M. agreed to, and did thereby, charge all and every their respective interests, &c., of and in certain leasehold messuages, &c., with the payment of the said 1081*l.* 14*s.* 2*d.*, and interest,

*154] &c., and whereby plaintiff and H. A. De M. did also agree to *execute a good and valid mortgage to Grove of the said leasehold messuages, &c., for securing the aforesaid sum and interest, &c.: Whereas, in truth and in fact, there was not, either at the time of such indorsement, delivery or taking as aforesaid, or at the time of executing and delivering such warrant of attorney as aforesaid, due and owing, upon and by virtue of such judgment, the said sum of 1060*l.* 10*s.*; but, on the contrary thereof, the amount due and owing at the respective times aforesaid, upon and by virtue of the said judgment, was much, to wit, 500*l.*, less than the said sum of 1060*l.* 10*s.*: all which, &c.; averment of knowledge by defendants.

2d count. That Grove, before the committing, &c., had entered up judgment in the Queen's Bench against plaintiff and one H. A. De Medina, upon a warrant of attorney theretofore given and executed by plaintiff and H. A. De M., for securing to Grove payment of a certain sum, to wit, 1081*l.* 14*s.* 2*d.*, and interest at 5 per cent. That, before the committing, &c., divers large sums of money, amounting to, &c., to wit, 1080*l.*, had been paid by and on behalf of plaintiff to, and been received by, Grove on account and in part satisfaction of the debt so secured as aforesaid: all which, &c.; averment of knowledge by defendants Weymouth and Righy. That, before the committing, &c., to wit, on, &c., defendants, then being in copartnership as in the first count mentioned, as, and then being and acting as, the attorneys of Grove in that behalf, caused to be issued out of and under the seal of the said Court, founded upon, and for having satisfaction of, the said judgment, a writ of fi. fa., directed to the sheriff of Middlesex, &c.: the count then described the fi. fa., as

*155] commanding to be *made from the goods of plaintiff and H. A. De M. a debt of 2164*l.* lately recovered on the judgment in this count mentioned, and 3*l.* 10*s.* for his damages, costs, &c.: Yet

defendants, well knowing, &c., but contriving, &c. (as in the 1st count), afterwards, to wit, on, &c., "wrongfully and injuriously caused" to be indorsed on the said writ a direction to the said sheriff to levy 320*l.*, besides poundage, &c., and then "wrongfully and injuriously caused" the said writ, so indorsed, &c., to be delivered to the said sheriff, &c., and "wrongfully and injuriously caused" the said sheriff to, and the said sheriff did then, to wit, November 23d, 1843, take and seize, under and by virtue of the said writ and in pursuance of said direction, goods of plaintiff, of great value, to wit, of the value of all the moneys so indorsed and directed to be levied as aforesaid, and kept and detained the same under and by virtue of the said writ until plaintiff afterwards, to wit, on, &c., paid, and plaintiff on, &c., was by reason of the premises forced and obliged to, and did then, pay, to the said sheriff the said sum of 320*l.*, besides the costs, &c., so indorsed, &c.: whereas, in truth and in fact, there was not, either at the time of such indorsement, delivery, seizing or payment as aforesaid, due, &c., to Grove, upon and by virtue of the said judgment the said sum of 320*l.*: and that, in truth and in fact, the sum fairly due, &c., to Grove, at the several times aforesaid, upon and by virtue of the said judgment, was much less, to wit, by 319*l.*, than the said sum of 320*l.*; all which, &c.; averring knowledge by defendants.

Pleas by Grove.

1. To both the counts. Not guilty.

To the first count.

2. That the sums of money therein mentioned had *not been paid to or received by Grove on behalf of plaintiff, on account or in part satisfaction of the damages, &c., in manner, &c. 3. That plaintiff was not, by force or duress of such imprisonment, forced or obliged to, nor did he, execute or deliver to Grove the said securities, &c., in manner, &c. 4. That the amount due and owing at the respective times mentioned, upon and by virtue of the judgment, was not less than 1060*l.* 10*s.*, in manner, &c. 5. That Grove did not, at the respective times when, &c., know that the amount due and owing upon and by virtue of the judgment was much less than 1060*l.* 10*s.*, in manner, &c. [*156

To the second count.

6. That the sums of money mentioned had not been paid by or on behalf of plaintiff to, or received by, Grove on account or in part satisfaction of the debt so secured as in the second count mentioned, in manner, &c. 7. That the sum fairly due and payable to Grove at the several times, &c., upon and by virtue of the judgment in the second count mentioned, was not less than 320*l.*, in manner, &c. 8. That Grove did not know that the sum fairly due and payable to him at the several times when, &c., upon and by virtue of the judgment in the second count mentioned, was much less than 320*l.*, in manner, &c.

All the pleas concluded to the country. Issues were joined thereon.

The defendants Weymouth and Righy pleaded jointly eight pleas corresponding to the eight pleas pleaded by Grove :(*a*) on which also issues were taken.

*157] *On the trial, before WIGHTMAN, J., at the sittings at Westminster after Trinity term, 1844, a verdict was found, upon the evidence stated in the judgment of the Court of Queen's Bench, post, p. 166, for the plaintiff on all the issues as against the defendants Grove and Weymouth, damages on the 1st count 200*l.*, on the 2d count 50*l.*; for the defendant Righy on the issues joined on his first, fifth and eighth pleas, and for the plaintiff on all the other issues as against defendant Righy. Leave was reserved to move to enter a verdict as after mentioned.

In Michaelmas term, 1844, on the respective motions of *Watson* on behalf of the defendant Grove, and of *Crowder* on behalf of the defendant Weymouth, rules nisi were granted for entering a verdict for both of those defendants, on the issues after mentioned (p. 166), or for reducing the verdict to nominal damages, or for a new trial, or to arrest the judgment.

In Michaelmas term (November 4th) 1845,(*b*) *Shee*, Serjt., and *Lush* showed cause against the rules, which were supported by *Crowder* and *Corrie* on behalf of the defendant Weymouth, and by *Watson* and *Butt* on behalf of the defendant Grove. The arguments, so far as they relate to the legal point decided, will sufficiently appear from the judgment in this Court, and from the proceedings in the Court of Exchequer Chamber.

Cur. adv. vult.

In *De Medina* v. *Grove*, the plaintiff sought to recover back from Grove the excess of the sum levied by the sheriff over the amount actually unsatisfied at the time of the execution. The declaration was in assumpsit

*158] *for money had and received. Plea: Non assumpsit. Particular of demand, claiming 324*l.* 1*s.* 5*d.*, being part of a sum of 325*l.* 1*s.* which defendant obtained from plaintiff by means of an execution issued by him on November 23d, 1843. The pleadings in *De Medina* v. *Grove and Others* (antè, p. 152), and the judgment of this Court (p. 166, post), make any further detail of the facts unnecessary. On the trial, before Lord DENMAN, C. J., at the sittings in London after Hilary term, 1845, the plaintiff obtained a verdict for 324*l.*; but leave was given to move for a nonsuit. *Watson*, in Easter term, 1845, obtained a rule to show cause why a nonsuit should not be entered, on the ground (taken at the trial) that an action for money had and received did not lie, the judgment being conclusive between the parties; or why, if the verdict proceeded on a supposition of fraud practised on the plaintiff, a new trial should not be had, inasmuch as the verdict on this point (as well as in

(*a*) Their 5th and 8th pleas averred that Weymouth and Righy did not know that the sum due, &c., was less, &c.

(*b*) Before Lord DENMAN, C. J., WILLIAMS, COLERIDGE and WIGHTMAN, Js.

other respects) was against the evidence, no fraud having been proved. In Michaelmas term (November 10th), 1845,(*a*)

Shee, Serjt., and *F. V. Lee* (with whom was *Allen*, Serjt.) showed cause. First: it is contended, on the other side, that, assuming *Moses* v. *Macferlen*, 2 Burr. 1005, S. C. 1 W. Bl. 219, to be an authority for an action of this kind where the recovery against the plaintiff has been obtained by means of a fraud, the evidence here did not sufficiently establish fraud. But there was proof from which a concerted scheme of fraud might be inferred. *Edwards* v. *Bates*, 7 Man. & G. 590, which may be cited as showing that the remedy, if due, can be *given only by a Court of equity, does not apply to such a case. [*159 Secondly, it will be urged, as ground for a nonsuit, that, even if fraud was proved, money paid under legal process cannot be sued for as money had and received; especially where the recovery was under a judgment which has not been set aside: and reliance will be placed on the dictum of Lord KENYON in *Marriott* v. *Hampton*, 7 T. R. 269,(*b*) that "after a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person." But that case was explained in *The Duke de Cadaval* v. *Collins*, 4 A. & E. 858: and the Court there held that, where there has been a mere extortion under colour of legal process, the money paid to get rid of such pressure may be recovered as money had and received. PATTESON, J., said: "The jury" "concluded that the defendant know that the debt did not exist, and that he used the process colourably. To say that money obtained by such extortion cannot be recovered back, would be monstrous." Therefore the rule laid down by Lord KENYON is subject to one exception at least. And in *Milnes* v. *Duncan*, 6 B. & C. 671, and *Hamlet* v. *Richardson*, 9 Bing. 644, though the general rule was recognised, HOLROYD, J., and TINDAL, C. J., laid stress upon the absence of fraud as essential to a defence under it. *Robson* v. *Eaton*, 1 T. R. 62, is, in principle, like this case. There, an attorney, employed without the plaintiff's authority, sued for a sum of money due to the plaintiff; the debtor paid the money into Court, and the attorney took it out: and it was held that this recovery did not bar the plaintiff from suing the debtor *for the sum paid; but that the attorney was liable to the defendant. It will [*160 be urged here that the former judgment was between the very persons who are parties to the present action: but, in the proceedings which led to that judgment, Grove and Strachan are so linked together that the recovery, though in Grove's name, may be treated as Strachan's. It may also be suggested that in *The Duke de Cadaval* v. *Collins*, the proceeding against the plaintiff had gone no farther than mesne process: but that can make no difference, if the principle is recognised that money recovered by legal process may be sued for as money had and received

(*a*) Before Lord DENMAN, C. J., COLERIDGE, WILLIAMS and WIGHTMAN, Js.
(*b*) S. C. at Nisi Prius, 2 Esp. N. P. C. 546.

when the proceedings have been merely fraudulent. In this case the whole was a nullity: the recovery was in the name of a person not the real party to the suit; the proceedings did not appear to have received his sanction; and there was no actual decision of a competent court, the judgment being on a warrant of attorney. That instrument itself was void, as being given under duress, and therefore money recovered under it cannot be retained; *Pitt* v. *Coomes*, 2 A. & E. 459. [WIGHTMAN, J. The fraud you allege might have been cause for setting the proceedings aside: but can you, on the grounds you state, call in question by a collateral suit proceedings on which a judgment has been recorded?] Setting these aside might be a remedy, but is not the only one. An inquiry by affidavit would not be the most effectual in such a case. And, if it is admitted that the proceedings might be set aside on motion, the judgment cannot be conclusive. But fraud makes the proceedings void to all intents. It is true that this doctrine seems to *161] *be qualified by *Prudham* v. *Phillips*,(a) where, in answer to evidence of the defendant's marriage, the plaintiff at nisi prius showed a sentence of the Ecclesiastical Court annulling the marriage; and it became a question whether the defendant might prove that the sentence was obtained by fraud: but WILLES, C. J., held that a person who was party to a judgment could not offer such proof, in a subsequent proceeding, to invalidate the judgment, for he might have applied to the Court which pronounced the judgment to vacate it: and in this respect his case differed from the case of a stranger. But on the *Trial of the Duchess of Kingston*, 20 How. St. Tr. 355, 479, 544, note, where the case of *Prudham* v. *Phillips* was much discussed (b) in the argument before the House of Lords, DE GREY, C. J., delivering the opinion of the Judges, said:(c) "If it" (the sentence produced in the case before the House) "was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice. Lord COKE(d) says, it avoids all judicial acts, ecclesiastical or temporal." In *Shaw* v. *Lord Alvanley*, 2 Bing. 325, the Court of Common Pleas appears to have thought that fraud and covin was an admissible plea to scire facias on a judgment. In *Cobden* v. *Kendrick*, 4 T. R. 431, the plaintiff, *162] *being sued for 150*l.*, had paid part, and compromised the action; but, discovering afterwards that the proceeding had been fraudulent, he brought an action to recover back the money, and, on proof of

(a) Amb. 763 (2d ed.); in *Meadows* v. *Duchess of Kingston*. See S. C. Harg. Law Tr. 456, note.

(b) P. 479, &c. (c) P. 544.

(d) See *Fermor's Case*, 3 Rep. 77 *a*, 78 *a*, *b*.

the fraud, succeeded. An objection was taken, that this action put the same sum in litigation a second time; but Lord KENYON is stated(*a*) to have overruled it, "on the ground that the money had been paid under a compromise, and not under the judgment of a court." TINDAL, C. J., however, says, in *Hamlet* v. *Richardson*, 9 Bing. 647: "As to the case of *Cobden* v. *Kendrick*, if it can be supported as to this point, we think it can only be so on the ground of fraud in the defendant." And in *Moses* v. *Macferlan*, 2 Burr. 1005, this Court expressly held that money, recovered by a judgment, might be recovered back in an action for money had and received, on the ground of fraud; Lord MANSFIELD resting his decision on the principle that, although the money had been obtained by course of law, it was against conscience that the defendant should retain it. That decision was questioned, but is not satisfactorily refuted by EYRE, C. J., in *Philips* v. *Hunter*, 2 H. Bl. 402; and even he admits that there may be a case where the action would lie. "If," he says,(*b*) "one could conceive an action by him who had been wronged by the judgment, founded upon the judgment, it might steer clear of the difficulty. Suppose one to say, 'you have recovered a judgment against me, which you ought not to have done, whereby I am injured;' this is making the judgment a part of the gravamen." There is, in fact, no real distinction between recovering money by a fraudulent judgment and acquiring it by any other *fraud. All acts are rendered void by fraud; judicial acts are pronounced to be so by DE GREY, C. J., in the passage already cited; and to say that, although they are void, application to a court is necessary to set them aside, would be limiting the invalidity in a manner for which there is no ground. This view of the law agrees with the summary in 2 Smith's L. C. 238—244, note to *Marriott* v. *Hampton*. And that which is true of the judgment in a contested case applies à fortiori to a judgment on a warrant of attorney, which is only a private security invested with the form of a record by the plaintiff's attorney. Parties may avail themselves of that process to enforce bonâ fide claims; but the Court will not permit the judgment to be made a medium of fraud. So, in *Fermor's Case*, 3 Rep. 77 b, which turned upon stat. 4 H. 7, c. 24, the Judges said: "It was never the intent of the makers of the act, that those, who could not levy a fine, should by making of an estate by wrong and fraud be enabled by force of the said act of 4 H. 7 to bar those who had right by levying of a fine." [*163

Watson and *Corrie* contrà. First: when a judgment has been recovered, a party to that judgment cannot impeach it by an action against the other for money had and received. As between those parties, the judgment is not to be assailed otherwise than by direct application to the Court in which it was given. As between strangers the case is different, because they have no locus standi in the original suit There is no

(*a*) 4 T. R. 432, note (*a*). (*b*) P. 415.

authority for the distinction suggested between judgments on warrant of attorney and other judgments. Every judgment is entered up by the plaintiff's attorney; but, when *that has been done, it is the act of the Court. If the action here was brought without proper authority, the course was (according to the constant practice in cases of fraud) to move to set the proceedings aside. When it is stated in the books that fraud invalidates any judicial act, the meaning is that it may be impeached on motion or auditâ querelâ. So, if the execution here was issued for too much (which is denied), the remedy (unless the wrongful proceeding had involved a breach of agreement) was by application to the equitable jurisdiction of the Court; *Wentworth* v. *Bullen*, 9 B. & C. 840, 849, judgment of PARKE, J. As to the suggested inconvenience of trying the alleged malpractice on affidavits, the Court may refer the case to the Master, or direct an issue. The doctrine of *Prudham* v. *Philips*, Amb. 763 (2d ed.), S. C. Harg. L. Tr. 456, note (where WILLES, C. J., "took a distinction between the case of a stranger who cannot come in and reverse the judgment, and therefore must of necessity be permitted to aver that it is fraudulent, and the case of one who is party to the proceedings"), has never been called in question. The judgment delivered by DE GREY, C. J., in the *Trial of the Duchess of Kingston*, 20 How. St. T. 537, not only does not overrule it, but enforces the distinction between parties and strangers. And the law is stated accordingly in 1 Stark. on Ev. 296 (3d ed.), and in note (*f*) to *Pitt* v. *Knight*, 1 Wms. Saund. 92 *b* (6th ed.). In the Duchess of Kingston's case the sentence was in a cause between the Duchess and Mr. Hervey, 20 How. St. T. 389, and was impeached by the Crown, a third party. GIBBS, C. J., in *Moore* v. *Bowmaker*, 2 Marsh. 392, S. C. 7 Taunt. 97, appears to have been of opinion that *judgment against a principal might be impeached by a surety on the ground of fraud upon him, but not by a principal alleging fraud upon himself. A fine levied fraudulently may be disputed by a stranger, but not by a party to the fine. *Marriott* v. *Hampton*, 7 T. R. 269, is a direct authority for the defendant, and the reasons of the decision strictly applicable. If the plaintiff could recover in this action, the defendant might bring another to recover the same money back. The only instance in which it is usual to allege fraud and covin for the purpose of invalidating judgments is where they are pleaded by executors; but there it is a stranger who impeaches the judgment. In the *Duke de Cadaval* v. *Collins*, 4 A. & E. 858, the payment was made under an agreement by which the action, having gone no farther than an arrest on mesne process, was put an end to. The Court did not hold that, when a judgment had been recovered, one of the parties might bring an action to impeach it.(*a*) The expression of HOLROYD, J., as to fraud, in *Milnes* v. *Duncan*, 6 B. & C. 671, adopted by TINDAL, C. J., in *Ham-*

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(*a*) See *Wilson* v. *Ray*, 10 A. & E. 82.

let v. *Richardson*, 9 Bing. 644, was used by each of those learned Judges with reference to the position of parties in the case then under his consideration; and no notice was taken of the distinction which might arise where an actual judgment had been obtained in the former suit. The position in *Moses* v. *Macferlan*, 2 Burr. 1005, referred to on the other side, has been repeatedly disapproved of; *Philips* v. *Hunter*, 2 H. Bl. 402, 414; *Brisbane* v. *Dacres*, 5 Taun. 143, 160 (judgment of HEATH, J.).(*a*) (The Court took time to consider *this point before they heard counsel on the objection that the verdict was against evidence.) [*166 *Cur. adv. vult.*

Lord DENMAN, C. J., in Hilary vacation (February 14th), 1846, delivered the judgment of the Court in both actions.

DE MEDINA *v.* GROVE and others.

THIS was an action upon the case for taking the plaintiff in execution upon a judgment for more than was due upon it, and for taking the goods of the plaintiff in execution upon another judgment for more than was due upon it. (His Lordship then stated the pleadings, and pointed out particularly the issues joined on the 1st, 2d, 4th, 6th, and 7th pleas.)

At the trial, the plaintiff obtained a verdict upon all the issues against the defendants Grove and Weymouth (the defendant Righy being acquitted); but liberty was reserved to them to move to enter the verdict for them upon the issues taken upon the above mentioned pleas, in case the Court should be of opinion that there was no evidence to support the verdict for the plaintiff upon those issues. The defendants accordingly moved for and obtained a rule Nisi to enter the verdict for them upon those issues, or to arrest the judgment for the plaintiff.

It appeared by the evidence that, in 1840, the plaintiff borrowed 1000*l.* of Strachan upon mortgage of eight houses, with power of sale if the mortgage money was not paid in two years, the mortgagee giving two months' notice; with covenants on the part of the mortgagor to repair and to insure. An action was brought against *the plaintiff upon the covenant to repair contained in the mortgage deed; [*167 and, by consent, judgment was entered up under a Judge's order in that action for 1060*l.* 10*s.* damages, which, it was understood, was to include the mortgage money and interest. In the early part of March, 1843, the defendant Grove, to whom the judgment was assigned,(*b*) and his attorneys, the other defendants, issued a capias ad satisfaciendum upon the judgment, indorsed to levy 1060*l.* 10*s.*; and, on the 17th April, the plaintiff was taken in execution under it. Between the time of issuing the writ and taking the plaintiff under it, various sums were received by the defendants Grove and Weymouth for the purchase of

(*a*) See 2 Smith's L. C. 240, note to *Marriott* v. *Hampton*.

(*b*) It appeared that, in November, 1842, Strachan had assigned all his property to Grove.

the mortgaged premises, which had been put up to sale under the power contained in the deed: but the premises were to be repaired. The amount actually received under the sale was upwards of 500*l.* The plaintiff, in order to procure her release from imprisonment under the ca. sa., executed a warrant of attorney for 2164*l.*, to secure the payment of 1081*l.* 14*s.* 2*d.*; and, in the November following, a fi. fa., indorsed to levy 320*l.*, was issued upon the judgment upon the warrant of attorney; and the execution of that writ forms the ground of complaint in the second count. If the amount of the money received from the sale of the mortgaged premises was added to the sums paid by the plaintiff or on her account, and taken in reduction of the sum of 1081*l.* 14*s.* 2*d.*, the amount secured by the warrant of attorney, the sum of 320*l.* would not, as the jury have found, have been due upon the judgment upon that warrant of attorney upon which the fi. fa. issued.

*168] *We will first consider the objection that arises upon the pleadings.

The action, in form, is unusual. The judgments stated in each of the counts are regular, for all that appears in those counts: they appear, upon the face of the declaration, to be unsatisfied: there is no averment of malice, or of the want of reasonable or probable cause for enforcing them to the extent to which they were enforced: but the ground of action is that the judgments had been partly satisfied by payments in part satisfaction, and that the defendants wrongfully and injuriously enforced them for the whole amount.

Primâ facie, the plaintiff has a right to take out execution upon an unsatisfied judgment for the amount of the debt or damages recovered. If the judgment has been satisfied in part, application may be made to the Court of Chancery, or to the equitable jurisdiction of the court of common law, to restrain the plaintiff from taking out execution, or rather from indorsing and executing his process for more than actually is due: but great inconsistency and inconvenience might arise if the merits or force and effect of a judgment, remaining wholly unreversed, and good upon the face of it, could be wholly or partially questioned in a collateral action such as this, in which the gist of the action, as it appears by the declaration, is the levying for the whole amount after it had been reduced by part payments.

If malice and want of reasonable and probable cause had been alleged, they would have formed the gist of the action, and the part payment would only have been a circumstance which alone would not have entitled the plaintiff to maintain an action.

*169] Upon the argument, many cases were cited, but none *which appeared to warrant such a declaration as the present.

In *Crozer* v. *Pilling*, 4 B. & C. 26, in which the cause of action was the refusing to discharge a person taken under a ca. sa. after tender of debt and costs, the declaration contained an averment that the refusal was

malicious and without reasonable or probable cause. In *Page* v. *Wiple*, 3 East, 314, which was an action for permitting and suffering the plaintiff to be arrested after payment of the debt and costs, the Court held that the action would not lie, notwithstanding the declaration contained an allegation of malice:(*a*) and in *Scheibel* v. *Fairbairn*, 1 Bos. & Pul. 388, it was held that an action would not lie for not countermanding a writ after payment of the debt, without an allegation of malice, which, it was said by the Court, was a necessary ingredient for the maintenance of the action. The case of *Saxon* v. *Castle*, 6 A. & E. 652, is in point with the present. The defendant there, as here, was stated to have issued a writ of ca. sa. indorsed to levy more than was due: and in that case, though the facts proved supported the plaintiff's case, the judgment was arrested because the allegation of malice was omitted in the declaration. LITTLEDALE, J., said in his judgment in that case: "in trespass, where the act of arrest is in itself illegal, no averment of malice is necessary; but in case for suing out a writ for more than is due, according to the precedents, and to the principles of distinction between actions of trespass and on the case, malice must be alleged."

Many other cases to the same effect might be referred *to, but [*170
all proceeding upon the same principle: and we do not find any substantial distinction between this and other actions on the case for malicious prosecution of civil suits without probable cause, in which the allegation of malice is a necessary ingredient.

We are, therefore, of opinion, that the judgment should be arrested. But, as we think that, under all the circumstances(*b*) of the case (including the arrangement under which the order of Mr. Justice COLTMAN was obtained), there was evidence to go to the jury that less than the full amount of the sums recovered by the judgments was due, we do not think it proper to disturb the verdict given for the plaintiff, or to direct it to be entered for the defendants upon the points reserved. The rule therefore will be absolute for arresting the judgment.

In the argument a distinction was insisted on between the case of Weymouth, as an attorney, and the other defendant Grove. But, as the charge is of doing the act knowingly, and the jury found knowledge against Weymouth as well as Grove, his character of attorney will not protect him. Righy, the other defendant, who was an attorney, against whom knowledge was not proved, was acquitted.

Rule absolute for arresting the judgment.(*c*)

(*a*) In Mr. East's report of the case it is stated that the third count, on which the judgment was arrested, contained no such allegation; and (p. 316) that this was the ground of the defendant's objection.

(*b*) It is not thought necessary to state these, no general legal principle having been laid down as to them by the Court.

(*c*) See *De Medina* v. *Grove and Others*, in Error, post, p. 172.

DE MEDINA *v.* GROVE.

THIS was an action for money had and received, to recover the amount levied under the fieri facias mentioned *in the second count of the declaration in the action upon the case upon which our judgment has just been given.

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The plaintiff obtained the verdict: and the question is, whether money levied under a regular execution upon a regular judgment unsatisfied can be recovered back again as for money had and received to the plaintiff's use, upon the ground that the judgment has been partly satisfied, and that the execution, though for less than the amount recovered, is for more than is actually remaining due.

We are clearly of opinion that this action is not maintainable, and that the entire or partial validity of a judgment good upon the face of it cannot be inquired into in this form of action; and that the only remedy in such a case is by application to the equitable jurisdiction of the Court, or to a Court of Equity.

If such an action as the present would lie, great inconsistency might follow. The Court might refuse, upon application, to interfere with the judgment or execution, and yet, if such an action could be brought, the defendant in the original action might recover the money levied, and so defeat both judgment and execution.

If there was any fraud in the case, that might be a ground for the interference of the Court to set aside the judgment or the execution: but, whilst both remain unreserved, it would be contrary to principle to reverse them in effect by an action to recover back the amount levied. No case was cited, nor are we aware of any that could be cited, to warrant such a proceeding; and we are therefore of opinion that the rule should be absolute for a nonsuit. Rule absolute for a nonsuit.

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*In the Exchequer Chamber.

(Error from the Queen's Bench.)

SOPHIA DE MEDINA *v.* GROVE and WEYMOUTH. *Feb.* 5.(*a*)

Held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that no action lies against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved. And

Quære, by WILDE, C. J., whether, even if such allegation and proof were made, an action is the proper remedy.

THE plaintiff below brought error on the judgment in this case,(*b*) so far as it regarded Grove and Weymouth. Error was assigned in the common form. Joinder.

(*a*) This case has been accidentally placed out of its order in point of time.

(*b*) See p. 152, 166—170, antè.

Lush, for the plaintiff in error. The judgment of the Court below puts the present action on the same footing with actions for malicious arrest on mesne process, or for malicious prosecution. But there is this difference; that, when the complaint is that execution has been issued for more than is due, the debtor's liability has been previously ascertained by judgment, so that the creditor cannot excuse himself on the ground of mistake, and his act is primâ facie illegal; whereas, in other cases with which the present has been confounded, the complainant has merely been called into Court in order that his liability, whether civil or criminal, may be ascertained, an act primâ facie legal, so that it must be charged to have been done maliciously and without probable cause, in order to negative the presumption of its legality. In **Saxon* v. *Castle*, 6 A. & E. 652, the declaration contained no averment of a scienter. In *Scheibel* v. *Fairbairn*, 1 B. & P. 388; [*173 *Page* v. *Wiple*, 3 East, 314, and *Gibson* v. *Chaters*, 2 B. & P. 129, the complaint related to mesne process; and, in the first two cases, to mere non-feasance of that which the defendants were not required by law to do. In *Crozer* v. *Pilling*, 4 B. & C. 26, the averment of malice might have been omitted, though it would have been necessary if the debtor had been in custody on mesne process. This view is fortified by *Wentworth* v. *Bullen*, 9 B. & C. 840, where the declaration complained of an execution for more than was due on a cognovit, and contained no averment of malice. [PARKE, B. The execution there was in violation of the terms of the cognovit: the action, though in form on the case, was substantially on contract, like *Marzetti* v. *Williams*, 1 B. & Ad. 415.] In *Gough* v. *Cribb*, 11 M. & W. 497, an action for indorsing a writ of execution for more than was due on a warrant of attorney and judgment, the declaration did not allege that the defendant had acted maliciously; yet it was not objected to. [MAULE, J. The judgment of the Queen's Bench here proceeds upon the want of averment that there was no probable cause, as well as on the want of an averment of malice. Suppose this declaration, remaining without alteration in other respects, had averred that there was probable cause?] Then it would be contradictory. [WILDE, C. J. No: there might be some doubt whether the payment made was to be appropriated to the judgment. MAULE, J. Or, though there was no doubt in that respect, it might be that the judgment was to stand as security for some *other debt. PARKE, B. Suppose there was a doubt as to the appropriation, what could the creditor do but issue execution for the whole, leaving the debtor to apply to the equitable jurisdiction of the Court? Is the averment that the creditor knew of the payment equivalent to an averment that there was no probable cause for disputing the appropriation?] The old cases contain no allegation as to the want of probable cause. In an action for distraining for more than is due it is not necessary to aver malice. [MAULE, J. A distress is not an act of the law itself; the distrainor takes the law into his own hands. [*174

Perhaps, however, there is not much in this distinction; I believe an execution creditor is not bound to indorse his writ at all; he may put it into the hands of the sheriff, and leave him to execute it; so that he may possibly be said, if he does indorse it, to take the law into his own hands, as much as a distrainor.] The declaration, in effect, charges a vexatious abuse of legal process. *Waterer* v. *Freeman*, Hob. 205, 266 (5th ed.), was an action of this sort: the defendant had sued out one fi. fa. to which the sheriff returned that the goods remained in his hands for want of buyers, and "the defendant well knowing this (to the intent to vex and double charge him" (the plaintiff)) "afterwards did sue out another fieri fac. to the same sheriff, and delivered it to him to be executed, who did thereupon levy the money," &c. [MAULE, J. There the defendant could have no right to issue the second writ: there is no allegation here that the defendants had no right to sue out execution for the whole debt, or that they knew they had no such right.] The facts alleged show this. [MAULE, J. No: there may be circumstances under which the writ might have been sued out both legally and equitably.] *175] They are not to *be assumed. [MAULE, J. You are the plaintiff, and should have negatived them by stating there was no reasonable or probable cause.] In *Grainger* v. *Hill*, 4 New Ca. 212, which was an action for abusing the process of the Court in order illegally to compel the plaintiff to give up his property, it was held unnecessary to aver that the process was without reasonable or probable cause. [MAULE, J. There the defendants arrested the plaintiff, not to obtain payment of the debt owing from him, but to compel him to give up his ship's register.] Here, the object of the execution is to compel the plaintiff to give up his money. [PARKE, J. That is effected by accomplishing the direct object of the process. MAULE, J. The special count in *Grainger* v. *Hill* may be taken as a circuitous count in trover. WILDE, C. J. The mortgage security in that case was incomplete for want of the ship's register; and the arrest was made with the indirect object of obtaining the register.] It was just as consistent with the declaration in that case that there might have been an agreement to give up the register as it is with this declaration that there may have been an agreement to allow the judgment to stand as security for some other debt. (He then referred to *Skinner* v. *Gunton*, 1 Saund. 228 *d* (6th ed.),(*a*) and to Com. Dig. *Action upon the Case for a Deceit* (A 4), to show that the averments in the declaration were sufficient, at all events, after verdict.)

Watson, contrà, was stopped by the Court.(*b*)

(*a*) On this point, reference was made, in the argument in the Queen's Bench, to *Gibbs* v. *Pugh*, 9 M. & W. 351, 362.

(*b*) On the question as to malice, reference was made, in the argument in the Queen's Bench, to the following authorities, besides those mentioned in the text: *Bromage* v. *Prosser*, 4 B. & C. 247; *Drewe* v. *Coulton*, (note (*b*) to *Harman* v. *Tappenden*) 1 East, 563; *Milward* v. *Sargeant*, ibid. 566; *Sinclair* v. *Eldred*, 4 Taunt. 7; *Mercer* v. *Sparks*, *Owen*, 51; *Field* v. *Mitchell*, 6

*WILDE, C. J. I am of opinion that the judgment must be affirmed. The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause. The question arising upon this record is, whether the action is maintainable without the usual averments of malice and want of probable cause. Even if there be a sufficient statement of malice in this declaration, there is no sufficient statement of the want of probable cause. It has been admitted in argument that the issuing of mesne process is primâ facie right: but a fortiori is the execution of a judgment primâ facie right; the presumption in favour of final process is much stronger than that in favour of mesne process. The statement of facts in this declaration is consistent with probable cause and even with absolute right. Circumstances have been supposed which would make it undoubtedly right to issue execution for the whole amount of the judgment. If an averment of want of probable cause is necessary, there are no words here equivalent to such an averment. In case of dispute as to the appropriation of payment, a person in the situation of the present defendants would have a right to litigate the question by issuing execution for the whole. If he applied to the Court for leave to issue such execution, the Court would refuse to direct him, and leave *him to issue it on his own responsibility. On the other hand, the plaintiff here might have applied, if the state of facts justified the application, either, before the arrest, to have satisfaction entered up, or, after the arrest, to be discharged. It might therefore be a question whether, even with all proper averments on the record, the proper remedy would be by action. For it might be contended that what is complained of by the plaintiff was mere irregularity. It does not appear that the party suing out a writ of execution is required to indorse it: he may let the execution go generally for his judgment, and leave the debtor to get out of it as he may: it is not only enough, but it is necessary, that the process should follow the judgment.(*a*) However that may be, there is no authority to show that the employment of either mesne or final process will furnish ground of action against the person employing it, unless he has acted maliciously, and without probable cause.

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MAULE, CRESSWELL, and E. V. WILLIAMS, Js., and PARKE and ROLFE, Bs., concurred. Judgment affirmed.(*b*)

Esp. N. P. C. 71; *Taylor* v. *Henniker*, 12 A. & E. 488; *Lewis* v. *Morris*, 2 C. & M. 712; S. C. 4 Tyrwh. 907; *Porter* v. *Weston*, 5 New Ca. 715; *Heywood* v. *Collinge*, 9 A. & E. 268, *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Willis* v. *The Bank of England*, 4 A. & E. 21. See note (*d*) to *Lake* v. *King*, 1 Wms. Saund. 130, 6th. ed.

(*a*) See *Webber* v. *Hutchins*, 8 M. & W. 319; *King* v. *Birch*, 3 Q. B. 425.

(*b*) The report of this case in the Exchequer Chamber is by H. Davison, Esq.

In the business of brickmaking the following things are necessarily done. The superficial soil being removed, the clay or brick-earth is dug out. Various foreign raw materials are purchased and brought to the *brick field by the brickmaker; for instance, chalk, breeze, sand, ashes and straw. Some of these materials are always added to the clay or brick earth. Sand and breeze are always so used, and, in the parish of Heston, are obtained by water and land carriage, the former from Woolwich in Kent, a distance of about thirty miles from Heston, and the latter from London, a distance of about fourteen miles. The quantity of chalk, ashes and breeze required to be used depends on the quality of the clay. Sometimes the clay requires to be washed; and, for the purpose of washing it, a steam engine is erected and used in many cases, but does not happen to be so on the field in question. The clay has also to be ground or mixed in a mill called a pug mill. Each pug mill is worked by one horse; and one is necessary for each stool; a stool being a frame or table at which the bricks are moulded: and a gang, consisting of a moulder, a temperer and an offbearer, a walk flatter, two pug boys and a barrow boy. Each stool is capable of making about 750,000 bricks in a year. The amount of capital required to enable the brickmaker to work each such stool is about 900*l*. Skill and care are required in mixing and applying the several materials above mentioned, as well as in the making and burning the bricks: and ignorance or carelessness on the part of those who mix the materials, make the bricks, or have to attend to the burning of them, would destroy the bricks. During the manufacture, the bricks are liable to be injured by the weather; and a single storm of heavy rain or hail has been known to cause injury to such bricks in a single brick field to the extent of several hundred pounds. The excise duty on bricks is also payable on the whole number once *moulded, whatever may afterwards become of them, and increases the amount of capital required to carry on the trade; but an allowance of 10 per cent. is made by the excise for waste, spoilage, &c. Bad and short seasons also render the process of manufacture of bricks of a precarious nature, and subject the brickmakers to considerable losses.

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The clay or brick earth obtained from the appellant's field has never been sold by the appellant in its unmanufactured state: and the only use to which he applies the field, or such clay or brick earth, has been in making bricks there with the different foreign materials before mentioned and the clay or brick earth obtained from the field. When the clay or brick earth is wholly used up in a field, the surface soil is replaced, and the field becomes generally available for agricultural purposes, but must generally, though not always, be considered as considerably deteriorated by having been dug out.

The above mentioned field has been used in the production of bricks, with four stools at work in it, for six years now last past. During the

last year about one acre has been used up, and about four acres of the remaining surface was applied to no useful purpose: but part of such remaining surface, as well as that part where the clay had been removed, was and is used as a drying ground for the bricks made during the year. The number of bricks actually made on the field in question in 1844 was 2,800,000. The whole of the field is calculated to have contained originally clay sufficient to make 31,000,000 bricks; and the part still unworked is calculated to contain clay sufficient to make 12,000,000 of bricks.

It is not usual for any one to rent a brick field *upwards of ten acres in size in Heston, or in any other part of England, for the purpose of their carrying on the business of a brickmaker and of using the clay found in such field in such business, except on lease for a term of seven years at least, subject to its determination sooner in the event of such clay being sooner exhausted. The appellants severally hold under such leases; and Westbrook holds the field above mentioned for a term of seven or fourteen years, or till the earth is dug out; and he is liable to pay to his landlord 20*l.* per annum as rent certain for the same, being a trifle under the sum of 2*l.* per acre, without any reference to the kind of use which he may make of the land: and he is also liable, in addition thereto, to pay his landlord a separate sum called a royalty, or realty, of 1*s.* 6*d.* for every 1000 of bricks moulded on such land in any one year. [*183

The rent per acre for the above mentioned field of 10a. 1r. 32p., which, on so taking a lease thereof with liberty to consume the soil and clay or brick earth (and without any liability to pay any royalty in respect of the number of bricks made), any tenant would have been willing to pay, would have been the sum of 10*l.* per acre only. The usual tenant's rates and taxes payable in respect of the same land would amount to 1*l.* 15*s.* per acre.

The appellants contended that the amount of rent per acre which a lessee would give as above stated, diminished by the aforementioned sum of 1*l.* 15*s.* payable for usual tenant's rates and taxes, is the highest sum on which, in respect of yearly value, the rate ought to be laid.

The respondents contended that the foregoing rate *on E. Westbrook was rightly laid, and for the following reasons. That, inasmuch as it is ascertained that a brickmaker pays a rent commensurate with the number of bricks made, such rent must be considered as the criterion of the annual value of the land while being worked out for bricks, and that, unless this mode of rating was adopted, brick lands could not be fairly rated. That there is a great objection to taking the yearly value at per acre: 1. On account of the difficulty of ascertaining the depth and quality of brick earth in each case. 2. That one brickmaker might employ twenty moulders on a single acre, and so quickly and almost immediately consume the clay, and consequently be assessed [*184

to and pay a rate for a short period only; whereas another individual, holding the same quantity of land, from want of capital or other causes, might employ but few moulders, and thereby continue to be rated for a greater number of years; and the principle of rating thereby become uncertain. 3. That a great difficulty would ensue by such mode of rating, from the necessity of repeated admeasurements to ascertain the quantity of land digging and manufacturing into bricks. And, lastly, the general uncertainty that must necessarily attend the rating of property buried beneath the surface of the soil. The respondents, therefore contended that the only just, fair and legal mode of rating this property was to ascertain the number of stools to be worked, and then rate upon the actual rent paid by the lessee to the lessor after all legal and proper deductions and allowances. Supposing this mode of rating to be recognised by the Court as the proper one, the amount of the rate was to stand, unless deductions hereinafter mentioned were allowed.

*185] *The appellants contended that the rate ought to be reduced, and that the land ought to be rated at, and not beyond, such annual value as it would let at for any purposes of agriculture only to which it might be applied. It was agreed that, as such land, the annual value per acre would be 2*l.* 6*s.* The appellants also contended that, if this their first proposition could not be maintained, still the principle on which the respondents had proceeded was clearly wrong, for the following reasons. That, on the facts before found by the sessions, if the value of the privilege conferred on the occupier, as derived from the employment of his skill, labour, and capital in manufacturing bricks, be all taken into account, still the rent per acre at which the said field might reasonably be expected to let from year to year (with the privilege of taking the said brick earth as incident to the demise of the said field), free of all usual tenant's rates and taxes, is the only lawful criterion by which the amount of rateable value can be ascertained: and that the rate ought, therefore, on the facts above stated and found, to be reduced from 159*l.* 10*s.* to 85*l.* 10*s.* The appellants also contended that, even if the respondents were right in valuing the said occupation, as they had done, by calculating the capabilities of producing bricks at the several stools likely to be employed on the land, still the land ought not also to be subjected to a charge of 46*s.* per acre, as other lands are rated in the same parish, the said 10a. 1r. 32p. not being employed for agricultural purposes, but being wholly used in the making of bricks, either in obtaining therefrom brick earth, or as a drying ground, or otherwise in the production of the very bricks on which the estimate and rate are

*186] made. *And the appellants also contended that, even if the respondents had rightly imposed the rate in respect of the said 46*s.* per acre, and in respect of the gross charge on the calculation of 750,000 bricks as capable of being produced in the year at each stool, still the deductions allowed by the respondents were erroneous and

insufficient: and the appellants contended that the deductions ought to be allowed in respect of the amount of tenant's rates and taxes, which is 3*s.* 6*d.* in the pound on the rental or rateable value, and 45*l.* in respect of interest on the capital invested in working each stool.

The sessions overruled these objections and claims of the appellants, and confirmed the rate, subject to the opinion of this Court on the several questions and claims above stated.

If the Court of Queen's Bench should be of opinion that the respondents' mode of rating was correct, the order of sessions was to be affirmed: otherwise that order to be quashed, and the rate to be amended, and any such order to be made in the premises as the Court of Queen's Bench should deem to be just.

The case of *The Queen* v. *Westbrook* was argued in last Hilary term.(*a*)

Martin and *Clarkson*, in support of the order of sessions. The rent of the land at 46*s.* per acre, and the royalty which the four stools might be expected to produce in the particular year, at 1*s.* 6*d.* per thousand of bricks, were the proper basis of the rate. That bricklands are rateable in respect of their product, under stat. 43 Eliz. c. 2, s. 1, is clear from *Rex* v. *Alberbury*, 1 East, 533; **Rex* v. *Woodland*, 2 East, 164, and *Rex* v. *Brown*, 8 East, 528, 529; the only question is as to the scale of rating. As to that, the case of the appellant Wightwick in *Rex* v. *Attwood*, 6 B. & C. 277, is not materially different from this. There the lessee of a coal-mine paid royalties for the coal raised; when the rate was made he had paid them during five months, to an ascertained amount, and he was rated, properly, as the Court held, on the sum which the overseers considered the annual value of the royalties. As the subject is explained by Lord ELLENBOROUGH in *Rex* v. *Bedworth*, 8 East, 387, the occupier of property yielding a valuable product is rateable, during the period for which the rate is made, for the concurrent annual value of such property: and this is so even if he farms it at a loss; *Rex* v. *Parrot*, 5 T. R. 593.(*b*) The principle is shown in *Rex* v. *The Hull Dock Company*,(*c*) and *Rex* v. *Mirfield*, 10 East, 219. In the latter case the appellant was rated for saleable underwoods; the woods were cut down and sold only once in twenty-one years, and produced no profit at other times: and the Court held that the proper rule was to require a constant yearly contribution according to an estimate of the product to be expected in twenty-one years, dividing that product in just proportions over the whole period. Lord ELLENBOROUGH said that, although none of the profits might be taken during the period for which the rate was made.

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(*a*) January 16th, 1847. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

(*b*) See *Regina* v. *Vange*, 3 Q. B. 242.

(*c*) 3 B. & C. 516, was cited; but probably the reference intended was to *Rex* v. *the Hull Dock Company*, 5 M. & S. 394.

"the property" was "at all times rateable according to the improvement in its value, or in the rent which might fairly be expected from it.'

*188] In *Rex* *v. *Lord Granville*, 9 B. & C. 188, the lessee of a colliery was held liable to be rated, not only in proportion to the mine rent which he paid, but also for an improved annual value accruing from machinery which enabled him to raise an additional quantity of coal. The appellants endeavour to deduce the principle of rating in the present case from the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, contending that the proper criterion of amount is the rent per acre at which the field might reasonably be expected to let from year to year with the privilege of taking the brick earth, free of all usual tenant's rates, &c. But that statute does not affect the present case. The deductions, there prescribed, for attaining the net annual value of the hereditaments previously mentioned apply, not to such property as brick lands, which are rendered productive by actually taking away the substance, but to the more usual subjects of rating, as houses and farm buildings and lands, which need repairs and other annual outlay to make them yield a profit, and in which the profitable subject is renewable at an expense. The proviso at the end of sect. 1, as to the hereditaments previously referred to in that clause, does not preserve or affect any principle which can operate upon the present subject matter. The rate on a brick field must be calculated upon the simple estimate of rent and royalties. [COLERIDGE, J. In the present case there is some expense incurred to make the land productive.] That is the mere expense of getting the materials, and is a distinct matter from the rent. [COLERIDGE, J., referred to the explanation of the word "liabilities" in *Regina* v. *Capel*, 12 A. & E. 382, 412, &c.] The appel-

*189] lants will contend that the royalty is not such a render as *can be incorporated with the rent for the present purpose: but in *Daniel* v. *Gracie*, 6 Q. B. 145, this Court held that an agreed sum per thousand for bricks gotten from a brick mine was a rent for which a distress lay. [COLERIDGE, J. A difficulty is thrown on you by the statement in the case, that, in point of fact, the rent which, on taking a lease with liberty to consume the brick earth (and without liability to royalties), any tenant would pay, is 10*l.* per acre.] The appellant has consented to take the land on different terms, upon the chance of such profit as the brick earth may yield. [COLERIDGE, J. If he sold his interest, the land, as the case finds, would be estimated as worth the rent of 10*l.* per acre.] The other parts of the case are inconsistent with this statement. The deductions allowed in the present assessment are not merely sufficient, but in their nature such as perhaps ought not to have been conceded.

Hill, *Deedes*, and *Pashley*, contrà. The rate ought to be calculated upon a permanent value, not upon a disproportionate profit casually thrown into a single year. But the case furnishes no materials for

ascertaining such a value. The number of stools does not show it; for a man may find it advantageous, at a particular time when sales are quick, to put up more stools than he will find employment for in after years. The rent of 10*l.* is assigned, not only to the first year of working, but to the next and subsequent years when the field is becoming exhausted: this cannot be a correct calculation. The principle of the Parochial Assessment act, 6 & 7 W. 4, c. 96, s. 1, is to attain the net annual value by making deductions for rates and *taxes, repairs, insurance, and other expenses necessary to keep the premises in [*190 a condition which will command the rent; the value is thus reduced to that of a permanent estate; a property that is never to become exhausted. On the principle assumed in the present case, which excludes this kind of calculation, the property is more highly rated because it is in a course of being destroyed: and, if a process could be found by which the clay could from year to year be renewed, the rate would be lowered in proportion to the expense of that process, though the real value of the property would be much increased. The fee simple of land under ordinary circumstances has been reckoned at thirty-three years' purchase; and brick lands might come under that estimate if the soil either did not become destroyed, or was exhausted so slowly that the progress of destruction was not appreciable. But that is not the case, and the difference, for the purpose of rating, between ordinary lands, and property which must perish if there cannot be certain deductions and outgoings for the purposes of preservation and reproduction, was pointed out as early as *Rex* v. *Brograve*, 4 Burr. 2491, 2493: and the distinction has been constantly acted upon: it was expressly adopted, for instance, in *Rex* v. *Tomlinson*, 9 B. & C. 163. The true principle of rating, in the present case, would be to ascertain what a person would give for the land as brick land, allowing a deduction in the nature of that which would be made for reproducing what is destroyed, if there were an invention for renewing it as the power of the soil to bring forth vegetable products is renewed by means of manure. The only *reproductive fund supposable in this case would be an annual [*191 reserve of so much as would purchase a new brick field when the present one was exhausted. The incorrectness of the course adopted in this rate may be shown by supposing that, in a single year, the building of a viaduct or other great work in the neighbourhood of the field caused a demand for bricks which almost exhausted it at once. The rate in that year, on the present principle, would be extravagant; in the next year it would sink almost to nothing. The very nature of rent implies that there is something capable of being rendered from year to year, and which is produced and reproduced by the land. On the same principle it is laid down that "tithes shall not be paid of anything that is of the substance of the earth and are not annual, as" (among other things) "brick;" 2 Inst. 651. Without pointing out the precise mode of assess-

ment which should be adopted here, it may be pronounced that any which does not give the net annual value communibus annis is wrong. The principle of rating on the average is supported by *Rex* v. *The Hull Dock Company*, 5 M. & S. 394: and the Court there relied upon *Rex v. Mirfield*, 10 East, 219. Lord ELLENBOROUGH said, in the latter case: "If they" (the saleable underwoods) "are rateable at all times, they will contribute according to their value, in exact proportion with the rest of the property in the parish: but if they are rateable in that year only in which they are cut, the sum they will have to contribute may materially vary, according to the proportion their value bears in that year to the rateable property of the rest of the parish, and may be much
*192] greater or much less than the aggregate sum it would *pay if it were rateable at all times." And, after pointing out the manner in which the general assessment of the parish would be affected by rating the underwoods in the twenty-first year only, he added: "A mode of rating which might produce such differences to the owner of this description of property, and to the parish, if he contributed only in the cutting year, cannot be the true rule; and the only other rule is a constant contribution, which will at all times fall equally upon this and every other species of property." The same reasoning applies here. And the decision in that case was recognised by the Court in *Rex* v. *Ferrybridge*, 1 B. & C. 375. As to *Rex* v. *Attwood*, 6 B. & C. 277, which was cited as establishing that the rate is to be measured by the rent and that the rent is measurable by the royalties paid, Wightwick's case, there stated, involved very different questions from those now raised; and the subject of occupation was a coal mine, which requires an expensive plant, and a continued and heavy outlay for draining and other purposes, so that the tenant necessarily works without much intermission, to get in the interest of his money, even though prices should fall: the royalties, therefore, may give a sufficiently correct measure of the production from year to year. But the permanent expenses of a brick field are comparatively small; and the tenant is not under the same necessity of working upon any uniform scale. The only basis, therefore, which the case, as stated, affords for calculating the rateable value is the estimated rent, the royalties being laid out of consideration. The value, at all events, cannot be carried higher than the 10*l.* annually per acre, subject to the deduction
*193] of tenant's rates and taxes, which is *correctly made, as well as the other deduction stated in the case. The ashes and other foreign materials used in manufacturing the bricks could not be included in a rate on the produce of the land. *Cur. adv. vult.*

The case of *The Queen* v. *Everist* was as follows.

On appeal by Henry Everist against a rate made in January, 1845, for the relief of the poor of the parish of Frindsbury, in the county of Kent, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

The appellant is the occupier of a piece of land in the parish of Frindsbury, containing brick earth, on which he makes and burns bricks. He entered upon the occupation by virtue of the following memorandum of agreement, and has since continued to occupy upon the same terms without any formal renewal of the contract. (The case stated the material parts of the agreement as follows.)

Memorandum of an agreement entered into, the 3d day of July, 1835, between John Batten, of, &c., (as agent to Thomson Hankey, Esquire, of the city of London, merchant) on the one part, and Henry Everist, of, &c., on the other part. First, that the said John Batten agrees to let to the said H. E. a certain piece of land as a brickfield, which is now and has been for the last . years in the occupation of the said H. E., as marked out, &c., in a field called Brickfield, &c., in the parish, &c., containing by admeasurement acres, together with the cottages thereon, on which to make and burn bricks, for three years *certain from Christmas, 1834, to Christmas, 1837, on the following terms: To make or pay for one million of bricks at least, for [*194 each year of the above period, at the rate of 2*s.* 3*d.* per thousand, and so on for every thousand beyond the said million; to be considered and estimated between the parties to be the same number as the duty to the King is actually paid for, such payment to be considered due and payable as a rent, and to be made on 25th March and 29th September in each year during the said term hereby granted, and in each and every year during which the said H. E. continues to occupy the said brickfield and cottages. The said John Batten, as agent, &c. (for Hankey), is to be at liberty to distrain the goods, &c., there found, and levy such arrears of the said payments or sums of money as shall be behind and unpaid, in like manner as by law might or could be done in case such arrears were due for rent of the said brickfield. (Then followed stipulations, not now material, as to a wharf and the creeks and road leading to it. The bricks were to be made, clamped, and burned on the ground marked out, and a clear road left over it, &c.) And, whereas the said H. E. is desirous to occupy, for other purposes than brickmaking, the remaining part of the said piece or parcel of land called Brickfield, containing by admeasurement 18a. 3r. and 39p., it is hereby understood and agreed, &c., that the said H. E. is to pay, in addition to the sum which may be due and payable for brickmaking, the annual rent of 3*l.* per acre upon nine acres of the said field, to be payable on 25th March and 29th September. Everist was also to pay all parochial rates, assessed taxes and assessments, and, at the expiration or other sooner determination of the term, to level the pieces of land where they should *have been [*195 dug or broken up by him, and leave them levelled, and fit for cultivation.

The appellant has occupied, for the purposes of brickmaking, the same piece of land as a brickfield in the memorandum mentioned for the last

fifteen years; and in the rates for the relief of the poor of the parish of Frindsbury, made prior to October, 1844, he has always been rated in the following manner. (The form of rate was set out, the material parts being) "*Description of property*. Brickfield and houses." "*Estimated extent*. 26a. 2r. 36p. *Gross estimated rental*. 111*l*. 10*s*. *Rateable value*. 98*l*. 15*s*. *Rate, at 6d. in the pound*. 2*l*. 9*s*. 4*d*." The making of bricks having greatly increased during the last ten years, a resolution of vestry was passed, 10th October, 1844, "That the several brick yards in the parish be rated at 1*s*. per thousand upon the supposed number manufactured at each stool, considering it a rental upon each stool. 500,000 bricks are made at each stool." In pursuance of this resolution the actual rateable value of the appellant's brickfield was endeavoured to be ascertained by a calculation of the number of bricks made. The net rateable value was raised from 98*l*. 15*s*. to 550*l*. by a rate made on the 10th October, which assessment was paid under protest. In January, 1845, another rate was made, in which the appellant was rated as follows. The case set out the form, which differed from that first above mentioned in the following particulars. "*Description of property*. Brickfields." "*Gross estimated rental*. 645*l*. 10*s*. *Rateable value*. 550*l*. *Rate, at 6d. in the pound*. 13*l*. 15*s*." The appellant duly appealed against this rate on the ground that he was overrated in respect of the yearly value of the land in his occupation.

*196] The clay or brick earth dug in the land in question *is never sold as such by the appellant, and is only one of the materials used in the manufacture of bricks. The other materials used in the manufacture of bricks are chalk, sand, ashes and breeze, all of which have to be brought to the brickfields from other places. The manufacture is attended with great risk and uncertainty; and, in the progress of making, the bricks are exposed to considerable damage from rains and other accidental causes; for which, however, an allowance of one-tenth from the gross number is made by the excise in charging the duty. When the rate appealed against was made, the appellant had twenty-two stools, for the purpose of brickmaking, upon his brickfield. The sum of 800*l*. per annum is necessary for the proper working of each stool. The sum paid by the appellant to Mr. Hankey under the memorandum of agreement, at 2*s*. 3*d*. per thousand of the bricks made, amounted in 1840 to 1010*l*. 9*s*. 6*d*.; in 1841 to 928*l*. 1*s*. 4*d*.; in 1842 to 960*l*. 7*s*. 2*d*.; in 1843 to 953*l*. 13*s*. 3*d*.; and in 1844 to 1324*l*. 4*s*. 9*d*.

It was contended for the appellant: First: That the land in question ought not to be rated higher than 1*l*. 10*s*. per acre, which is the average value, to let and of rating, of ordinary agricultural lands in the parish. Secondly: That, if any addition is to be made in respect of the land containing brick earth, the sum per acre ought not to exceed 3*l*. 10*s*., which is the average value of the best garden ground in the parish to

let by the acre. The respondents contended that the sum actually paid to Mr. Hankey for bricks made upon the land rated, under the memorandum of agreement, was to be considered as the rent which the appellant bound himself to pay, taking all the chances of making the trade of brickmaking profitable; and that the mode by *which the parish arrived at the amount of bricks made was immaterial. It [*197 was admitted that, if this view were correct, the amount of the rate did not exceed the rateable value of the land after making all lawful deductions. The other rateable property in the parish is rated upon an estimate of the net annual value thereof within the meaning of stat. 6 & 7 W. 4, c. 96.

The question for the opinion of this Court was, what is the net annual value of the land in question?

If the sums paid by the appellant under his agreement were to be considered in the nature of rent, and as such ought to form the basis of the rating, the order of sessions was to be confirmed.

If either of the modes contended for by the appellants should be considered correct, the case was to be sent back to the sessions that the rate might be adjusted accordingly.

This case also was argued in last Hilary term.(*a*)

Sir *F. Thesiger* and *Bodkin*, in support of the order of sessions. The land cannot be rated as agricultural or garden land, but must be assessed according to the use actually made of it. [*Hill*, contrà, admitted these propositions.] The reservation in the agreement is in the nature of a rent, and is the proper basis of rating. It is reasonable that, between the landlord and tenant, a sum calculated upon what the land is actually made to yield should be considered the rent: as, if they agreed that so much should be paid for every quarter of wheat produced. The principle that land which becomes a source of profit by being employed in a *particular manner is rateable in proportion to the profit so [*198 obtained is well known: the application of it was discussed in *Regina* v. *The London and South Western Railway Company*, 1 Q. B. 558,(*b*) and *Regina* v. *The Grand Junction Railway Company*, 4 Q. B. 18,(*c*) with reference both to the case in which the landowner keeps the property in his own hands and to that in which a tenant occupies it. In the latter case, the subject matter of rate, upon land in the owner's hands, was arrived at by successive deductions: here a tenant has possession, and the result presents itself at once: the only question is whether that which appears is a rent or not. The argument, that it is not so because the subject of occupation is being destroyed, would extend to slate quarries and coal mines, but has never yet been applied to these. The only practicable course in such a case is to rate the land according to its

(*a*) January 27th, 1847. Before Lord DENMAN, C. J., and PATTESON, J.

(*b*) The passage at p. 581, beginning "There is a class of cases," &c., was particularly referred to.

(*c*) And see *Regina* v. *The Great Western Railway Company*, 6 Q. B. 179.

actual productiveness at the time, so long as it retains the productive quality and the occupier can afford to pay a rent. There is no principle on which an average of years can be taken, when the whole subject matter may be exhausted in any one year. The rule of allowance for a renewal fund does not apply. If the product has actually failed at the time when the rate is made, so that there is then no profitable occupation, the occupier may prove that on the appeal, as was done in *Rex* v. *Bedworth*, 8 East, 387.

Hill, *Deedes* and *Pashley*, contrà. On the finding of the sessions no ascertained rent appears. In point *of fact the sums which Everist has paid have varied from year to year. If he had bound himself to pay a given sum every year at all events, that, as to certainty of amount, would have been a rent; but no prudent man would have so undertaken, considering the vicissitudes to which demand in this kind of business is subject. The agreement itself does not declare the royalty to be rent; the stipulation, that it may be distrained for "in like manner as by law might or could be done in case such arrears were due for rent," implies the contrary. Even if the parties had called it rent, the question would be whether in fact it was or was not so. The finding is defective, both because there is nothing from which the amount likely to be payable for the number of bricks exceeding a million can be estimated, whereas, under stat. 6 & 7 W. 4, c. 96, s. 1, it is essential that the rate should be calculated on the rent at which the premises "might reasonably be expected to let from year to year," and, further, because, if a definite sum had been arrived at, it would not be, in its nature, a rent. Periodical payments for the yield of brick land, which, by the increase of demand and by modern improvements in working, will in a very short time be exhausted, are not a rent but a purchase money for the land itself. If the principle assumed on the other side be correct, a house which, under an act of parliament, was, within a certain time, to be pulled down and not rebuilt, would be rated higher than neighbouring houses, because there was no necessity for a renewal fund. This line of argument, which was urged also in *Regina* v. *Westbrook*, antè, p. 190, has *not been attended to in earlier cases; nor would it formerly have had the weight which it now derives from the rapid exhaustion of pits as at present worked. The argument, that the land is properly assessed in proportion to the value it derives from its applicability to certain purposes, does not meet the objection founded on stat. 6 & 7 W. 4, c. 96, s. 1. And the rate assumes, in effect, to bring under assessment the profits of a manufactory, "obtained by applying the skill and industry of man to" the product of the soil: which is contrary to the principle acted upon in *Rex* v. *The Birmingham Gas Light and Coke Company*, 1 B. & C. 506. *Cur. adv. vult.*

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Lord DENMAN, C. J., in this vacation (February 25th), delivered the judgment of the Court.

These were cases sent from the Sessions respectively of Middlesex and Kent, which may properly be considered together, being intended to procure a decision on the same question; the proper mode of rating the occupiers of brickfields to the relief of the poor.

The material facts found in both cases are nearly the same. In both it is stated that much expense and the introduction of foreign matters are necessary, in order to make the occupation productive and profitable; and the result is liable to much risk: it is understood, therefore, if not made legally certain, that the tenancy shall be of some years' duration, and the rent is in part only fixed, in part made to depend, in the nature of a royalty, on the number of bricks made; the material, the brick earth, is not in its nature renewable, and in *both cases will be consumed, according to reasonable calculation, within no great number of years. In both cases the basis of the rate has been the supposed total amount paid to the landlord, considering as well the royalty as the fixed sum to be rent, and to be the proper criterion, within the Parochial Assessment Act (6 & 7 W. 4, c. 96), of the rent at which the land may "reasonably be expected to let from year to year," free of such charges, and making such deductions, as the statute specifies. In the case of Westbrook, however, the Sessions have found that "the rent per acre" which, on "taking a lease" "with liberty to consume the soil and clay or brick earth (and without any liability to pay any royalty in respect of the number of bricks made), any tenant would have been willing to pay, would have been the sum of 10*l.* per acre only." No finding correspondent to this appears in the case of Everist. [*201

The question which we have to determine is, whether the principle on which the parish officers have proceeded is correct with reference to the statute before alluded to. We must assume the amounts to be correct, both as to the royalty and the deductions made: and no question involving any difficulty in principle was raised as to the nature or number of these last.

It will be convenient in the first place to consider the question without reference to the special finding in Westbrook's case: and then to see whether that finding makes any difference in the decision of that case.

It is objected by the appellants, in the first place, that it is a fallacy to infer, from the fact that there are so many stools on the ground from which so many thousand bricks may be made in each year, that so many will in fact be made and paid for; or, secondly, *from the fact that so many have been made and paid for in one year, that the same or an equal number will be made and paid for in the following year and years. And without doubt the conclusions do not follow with certainty from the premises: but the answer to the first of these remarks is, that it is rather a question of amount than of principle; it does not touch the question of whether the royalty is in substance a rent. Considered as a question of amount only, the parish officers, having to make a [*202

prospective rate, may well look to see what it is probable the land will be made to produce in the current year: they may well proceed with a brickfield as they would with land used for agriculture; they cannot in that case tell for certainty how much will be tilled, nor with what grain, still less how much will be produced, or at what price sold; yet, supposing the tenant to occupy at a rent to be ascertained in each year by the actual produce and price, as it well might be, they may reasonably beforehand, from such premises as the nature of the land, its usual mode of cultivation, the preparations actually made, if any, and other such circumstances, infer what will be the rateable value in the given year. In the present case we cannot say that the nature of the occupation does not afford rather safer premises for drawing the conclusion as to amount. The preparations are somewhat of a more permanent nature: it is not unreasonable to infer that the stools would not be erected but with the intention of making bricks; and that more would not be erected than the quantity of bricks to be made would require; and that more bricks would not be made than were expected to be sold,
*203] especially as the duty to government and the royalty to the *landlord are to be paid, not on the sale, but the making. These premises raised at least a primâ facie case; and, if they led to an exaggerated conclusion, it was in the power of the appellants to have shown the error by actual proof. As to the second objection, the answer is that the rate is made but for the year, and any falling off in succeeding years would, of course, operate in reduction of the rate for those years.

But the next objection is a more important one; that it is altogether wrong in principle to consider the royalty as rent: and this appears to be founded mainly on this, that it is a sum paid, not in respect of the renewing produce of the land, but of a portion of the land itself, and that not consumed by slow degrees, and to be exhausted at the end of a long period, as is the case with a coal mine, under which circumstances it was admitted that it might be treated as produce, but in such large proportions that the whole would in a few years be exhausted. It does not appear to us that the circumstance of a more or less rapid consumption can make any difference in the principle. The rate is always imposed with reference to the existing value; whether temporary or enduring is immaterial. A case was supposed of a brickfield worked out in less than a year to meet the demand of some enormous contract for a public work; the consequence would be that the land would have a very much increased value for the year, and it would be only reasonable that it should bear an increased rate for that year: in the following year its value might sink almost to nothing, and the rate ought to fall proportionately, even to nothing, if, the brick earth being exhausted, the land, like an exhausted coal mine, should become entirely unproductive. If this
*204] *were not so, an obvious injustice would be done to the other ratepayers. Suppose two brickfields of the same size, which, worked

so as to be consumed in ten years, and, by equal working in each year, would produce 1000*l.* each, on which the rate should be 10*l.*, in ten years, each will contribute 100*l.* to the parochial burthens: let one be exhausted in the first year, the produce will have been 10,000*l.*, but the rate only 10*l.* for that year, according to the appellant's argument, and it may be nothing afterwards: but, whatever it be afterwards, it is clear that there will have been a valuable occupation in one year, escaping, as to nine tenths, the rate entirely. But no injustice would be done, if in every year the occupier could be assessed according to the actual value in that year; and it is the duty of the overseers to arrive as nearly at this as they can.

The case of *Rex* v. *Mirfield*, 10 East, 219, was mentioned in the course of the argument. The facts of that case are wholly unlike those of the present. The saleable underwoods there produced no profit except in the twenty-first year. Here there is nothing to show that equal profits may not arise in every year of the tenancy, long or short; the term of tenancy is fixed on that assumption. The principle, however, of that decision is in accordance with what will be our conclusion.

We come, then, to the bare objection that the royalty is paid, not for the renewing produce of the land, but for several portions of the land itself, mixed up with foreign matter: the expense of this, however, must of course have been cast off before the royalty itself was *fixed. [*205 That was a sum which, after all such expenses paid, the occupier could afford to render to the landlord. When the case is thus laid bare, there is no distinction between it and that of the lessee of coal mines, of clay pits, of slate quarries: in all these the occupation is only valuable by the removal of portions of the soil; and whether the occupation is paid for in money or kind, is fixed beforehand by the contract, or measured afterwards by the actual produce, it is equally in substance a rent: it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows. This would not admit of an argument in an agricultural lease, where the tenant was to pay a certain portion of the produce: that would be admitted to be in all respects a rent service, with every incident to such a rent: and in *Daniel* v. *Gracie*, 6 Q. B. 145, we held the same with regard to a marl pit, and brick mine, as the parties termed it, where the render was of so much per cubic yard of the marl dug, and so much per thousand of the bricks made.

We are brought, then, to the conclusion that the parish officers have done right in considering the royalty as a portion of the rent: and we see no objection to the mode by which they arrive primâ facie at the conclusion that the amount of royalty reckoned in the rate will be paid in the year for which the rate is made.

Still, it must always be remembered that the ultimate question is that propounded by the statute; and therefore the amount which has been

the rate upon the Company in the hamlet ought to stand, and do stand, at the amount at which the said Company were rated in respect of their works in the said hamlet in January, 1843, that is to say, on the net estimated rental or rateable value of 1473*l.*

He also further stated for the opinion of the Court the following facts.

The Company is incorporated by a public act of parliament,(*a*) to which the Court is referred. The whole subscribed capital of the Company, viz. 443,300*l.*, together with a further sum saved out of income, in the whole 674,500*l.*, has been invested in permanent works, situate in twenty-one parishes or parochial districts, having separate poor rates. Out of this sum 19,000*l.* have been invested in the hamlet of Mile End Old Town. The revenue (with a trifling exception) arises from water rates; and the gross annual receipts of them amount to - £54,000.

The annual disbursements, including all the deductions specified in the act 6 & 7 W. 4, c. 96 (Parochial Assessment Act), and also including remuneration for personal skill, labour and management, amount to - - - - - - - £18,000.

The gross receipts for water rates in the hamlet are - 8,900.

*210] *The disbursements in the same are - - 3,000.

Hence the total net receipts of the Company amount to 36,000.

Ditto ditto (in the hamlet) - - 5,900.

The Company also have and require an average stock of personal property consisting of coals, materials and other goods on their premises, of the value of 2000*l.* In several of the parishes the water rates are very trifling: but the Company possess therein extensive permanent works, such as buildings, reservoirs, conduits, canals, bridges and mains, yielding to the Company no other profit than as being conducive to the earning of water rates received in other parishes. The annual value of these may be assumed, for the purpose of this case, to be 6500*l.* as mere land and buildings, with their fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company.

In the hamlet of Mile End Old Town there are no works except mains and pipes for the supply of the inhabitants.

The quantity of mains and pipes, and of land occupied by them in the different parishes in which water rates are received (excluding from the calculation all land, reservoirs, buildings and other the permanent works above mentioned rateable merely as such, without regard to the profit derived from water rates), may be taken in this case to be in the direct ratio of the gross receipts in each parish.

Any one who should become a lessee for a term of years under the Company of the whole water works throughout the district, with the intention and power of supplying it with water, under the powers of the

(*a*) Stat. 47 G. 3, Sess. 2, c. lxxii. Local and personal, public.

*Company's act of parliament, ought to have at his command a floating capital of 20,000*l.* But no prudent person would take a [*211 mere lease from year to year of such a concern; nor would he take a lease of the works in any single parish only.

The rate made by the overseers of the hamlet on the Company is a good one, and ought to stand, if the following mode of calculating the rateable value of the mains, pipes, &c., be tenable in point of law.

As the total net receipts, viz. 36,000*l.*, measure the full value of the water works in the hands of a lessee who must retain his own profit out of them, the Company ought not to be assessed upon that entire amount; for a tenant under them would be entitled to expect a large return of profit on a concern requiring judicious management and the employment of a large capital, and involving risk and responsibility. He might have to borrow the necessary capital at 5 per cent., and would be entitled to a large trade profit on his floating capital and on the stock of personal property necessarily kept in hand on the premises. A profit of 25 per cent. on the sum of 20,000*l.*, and 10 per cent. on the value of the stock on hand, may be assumed as not unreasonable under the circumstances. The profits of the tenant may therefore be taken at 5200*l.* per annum. The remuneration for personal trouble now received by the board of management would be received by the lessee himself, and is already included in the disbursements. The difference, namely 30,800*l.* per annum, is what a lessee would be willing to pay to the Company under his lease, and is therefore the net estimated rental or annual value, on which the rate should be calculated if the whole works were in one parish. But, the works being in different *parishes, in some of which (as above stated) no profits are derived from water rates, [*212 the basis of valuation will not be uniform throughout all of them. The parishes in which large profits are made by water rates will take those profits into their estimate, because the mere land covered by the mains and pipes is of trifling value. On the other hand, the parishes in which the water rates are small or none, and the land, buildings and machinery of the company extensive, will base their estimates on the probable rent of the land and buildings *as such*. Hence, before the net rental of 30,800*l.* is apportioned among the parishes in which the water is delivered and the water rates actually received, the annual value of works, legally rated on a different principle or basis, must be deducted: this last mentioned value is (as above stated) 6500*l.*; and therefore the net annual value to be apportioned among the parishes in the ratio of the net receipts for water rates in each is 24,300*l.* The result gives an annual value in Mile End Old Town which will support the rate. So, if this net value be apportioned among the parishes in which the water rates are received, in the ratio of the quantity of mains, pipes, and land occupied by them, in each, the result will be nearly the same, and will

support the rate, inasmuch as those quantities are (as above stated) to be taken in the present case to be in the ratio of the gross receipts.

On the part of the Company it is contended:

1. That the net *receipts* do not represent the *earnings* in each parish, the water rates being in fact earned, not by the pipes in the particular parish, but by all the works of the company employed to collect and to distribute the water from its sources.

*213] *2. That the deduction in respect of tenants' profits should be ascertained by a per centage on the gross receipts of the Company; and they claim a deduction of ten per cent. for such profits.

As to this point I find, as a fact, that the tenants' profits bear no definite proportion to the gross receipts, and cannot be ascertained solely by reference to such receipts, but are governed by other extrinsic considerations.

3. That some allowance should be made for goodwill, such goodwill being the pecuniary value of the advantage which a lessee or assignee of the Company derives from his enjoyment of an established business and customers already secured.

4. That, assuming 36,000*l.* to be the net value of the whole of the works of the Company, and the basis of the entire rate on them, the amount ought to be distributed among the parishes in proportion to the quantity of fixed capital or property of the Company in each. That, the proportion of such fixed capital or property being fairly represented by the sums invested in works in each parish, the rateable value in the hamlet may be ascertained by the following proportion, that is to say: As the whole fixed capital (674,500*l.*) is to the whole net receipts (36,000*l.*) so is the fixed capital in the hamlet (19,000*l.*) to the portion of net receipts rateable in the hamlet (1014*l.*)

As to this last point made by the Company, I find, in the absence of proof to the contrary, that the relative quantity of fixed capital or property of the Company in each parish (including not only mains and pipes, but also their extensive permanent works of every description throughout the district) is fairly represented by the sum *that *214] has been invested in works in each parish; and that, if the principle propounded by the Company be correct, then the rate should be on the last mentioned sum of 1014*l.*

This case was argued in Easter term, 1847.(*a*)

Hill and *Clarkson*, in support of the order of sessions. It is admitted that the net annual value of the rateable property is 30,800*l.*: and the only question is as to the apportionment of that amount, for the purpose of rating, among the different parishes in which the property lies. The arbitrator has divided this property into two classes; the mains and pipes, which are directly employed in the distribution of water, forming

(*a*) Wednesday 21st, and Saturday 24th, April. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

one class; and the reservoirs, conduits, and buildings, &c., which are only indirectly so employed, forming the other class. The net annual value of the latter class he puts at 6500*l.* as mere land and buildings, deriving additional value from their capacity to serve the purposes of a water company, and the net annual value of the former class at the residue of the above mentioned total of 30,800*l.*, viz. at 24,300*l.* This distinction is unsound; and the effect of it is that an undue value is assigned to the former class of property. The property should be valued in its entirety; for every part of it is necessary to the acquisition of profit. The question is, not where the profit is received, but where it is earned. Without the reservoirs and pumps, the pipes would have no water to distribute. How then can it be said that the pipes earn all, and the reservoirs and pumps earn nothing? *[ERLE, J. The established principle of rating railways is to take the land in any particular parish according to its actual [*215 value there, although that value may be much increased by station houses and other works in a different parish. [The analogy of railways is fallacious: the profits of a railway depend upon mileage; but water is not paid for according to the distance it has travelled through the pipe which supplies it. The analogy of canals is also in like manner inapplicable. In *Rex* v. *The New River Company*, 1 M. & S. 503, it was contended that profits received by the Company elsewhere could not be taken into account in rating a spring at Amwell, where no profits were received: but the argument did not prevail. In this case, it is stated in the award that no one would take a lease of the works in any single parish only. It is clear that the value of the property is as a *whole;* detached parts may be absolutely worthless; any one of the Company's bridges can have no value, except as part of that whole which earns the water rate. [ERLE, J. Is there any better principle than that suggested in the award?] The principle contended for by the Company, and stated in the award, is the true principle. If there is a pumping engine, and nothing else, in parish A., and all the profit is received by parish B., is A. to have nothing towards its poor rate? [ERLE, J. Suppose there is a pumping engine erected at an expense of 100,000*l.* close to the Thames, and a pipe, at the cost of 20*l.*, takes the water into another parish, where all the profits are earned, must the rate in the former parish be to that in the other parish in the ratio of 100,000*l.* to 20*l.*?] The profits *would not be *earned* in the second parish only, though [*216 they would be received there. The award does not state on what principle the value of the buildings and property of the same class has been ascertained; it appears to be an arbitrary assessment.

Sir *F. Kelly*, *Bodkin* and *Hodges*, contrà. There is no authority for such a mode of distributing the rateable value as the Company suggest. Suppose three parishes, each having a reservoir. The Company contends that the cost of each reservoir should be taken into consideration;

so that, if one of the reservoirs, on account of the value of land, cost a very large price, another a very small price, and the third nothing at all, the rate would be laid accordingly, even though the last reservoir should produce nearly the whole profit. Many other difficulties will arise if cost, instead of value, be taken as the measure of rateability. [PATTESON, J. Was the arbitrator right in first deducting the rateable value of the buildings, &c., and then distributing the rateable value of the pipes, &c.?] *Regina* v. *The London and South Western Railway Company*, 1 Q. B. 558; *Regina* v. *The Great Western Railway Company*, 6 Q. B. 179, and *Regina* v. *The Cambridge Gas Light Company*, 8 A. & E. 73, show that he was right in so doing. [PATTESON, J. The buildings in this case are conducive equally with the pipes to the profit earned. They differ in that respect from railway stations, which take no part in the transit of goods or passengers.] Railway stations are essential to the whole traffic: unless stations were provided at convenient
*217] *intervals in a line of railway, other modes of conveyance would be preferred, and the railway become useless. The buildings, &c., are rated on the additional value which is given them by their adaptation to the purposes of the company, and are properly rated in that parish only in which they are situate; their value could not legally be brought into account in other parishes; *Rex* v. *The Corporation of Bath*, 14 East, 609; *Rex* v. *Milton*, 8 B. & Ald. 112; *Rex* v. *Lower Mitton*, 9 B. & C. 810.

Hill, in reply.(a) If the buildings and pipes were both in the same parish, they would not be divided into two classes for the purpose of ascertaining the rateable value of each separately; the principle is the same where they are in different parishes, though its application may be difficult. How is it possible to put any value at all on the buildings, &c., except as a part of one entire apparatus? The rateable value of the property is the rent it would fetch: but no one would rent less than the whole. Unless taken in its relation of part to a whole, a reservoir may be nothing more than land spoiled for want of drainage, or, at best, a fishpond. The Court has never been called upon to determine the principle on which the value of any particular railway station is to be ascertained, and cannot therefore have decided that it is to be ascertained on a different principle
*218] from that which is applicable to any *other portion of the line. In *Regina* v. *The Great Western Railway Company*, 6 Q. B. 179, 185, 204, the appellants claimed *an allowance* for their buildings; and the present point was not discussed.

The Company do not contend that the rateable value is to be distributed according to the cost of the works: but, as the proportion of fixed capital in each parish happens to be (as found by the award) fairly repre-

(a) By leave of the Court. A question had been raised as to the right to begin. It was said that, as the award had practically the effect of quashing the order of sessions, counsel in support of the award should be first heard; but the Court decided that the ordinary course in arguing cases from sessions should be followed.

sented by the cost, they suggest the cost as a convenient term for working out the required problem. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

In this case, the rateable subject, being the apparatus for supply of water situate in twenty-one parochial districts, and the rateable value, that is 30,800*l.*, being the residue of the gross receipts after making all the deductions to which the Company are entitled, have been correctly ascertained by the award The principle for dividing that sum among those districts is the matter to be decided.

The Company contend that the division should be according to the amount of fixed capital in each district. But the rule of law, laid down by act of parliament, for ascertaining the rateable value of any subject refers to an estimate of the rent it should yield.

The outlay of capital might furnish no such criterion; since it may have been injudiciously expended, and what was costly may have become worthless by subsequent changes. As our opinion is against the Company, upon *the objection relied on in argument on their behalf, [*219 it follows that the rate should be affirmed.

But, as the award suggests different methods of apportioning the rateable value, and so arriving at the same rate, it would be convenient if we also stated our view of those methods for applying the above rule of law to such rateable subjects as the present.

The first step in apportioning has been in effect to divide the whole apparatus constituting the rateable subject into two portions; of which one is directly productive of rateable value, being the service pipes which deliver the water to the consumer; the other indirectly conduces to such production, being the rest of the works bringing the water to the service pipes.

The second portion has been first rated in the ordinary way by valuing the land with the buildings and fixtures thereon, and the amount of rate so ascertained has been deducted from the sum of rateable value, and distributed to the districts in which the parts of this portion are situate. An analogous course appears to have been adopted for railways in *Regina* v. *The London and South Western Railway Company*, 1 Q. B. 558; *Regina* v. *The Grand Junction Railway Company*, 4 Q. B. 18; and for gas companies, in *Regina* v. *The Cambridge Gas Light Company*, 8 A. & E. 73. Also the spring which indirectly conduced to the ultimate profit by water rate was held rateable in the parish where it was situate, in *Rex* v. *The New River Company*, 1 M. & S. 503, the quantum of such rate being left for the sessions.

As this course was acquiesced in by both parties in the three latest cases, we may presume that it can be *applied without practical [*220 difficulty: and we see no objection to it.

The remaining step has been to apportion the residue of the rateable value among the districts in which the direct productive portion of the

works is situate, in the ratio either of the net profits, or of the gross receipts, or of the quantity of mains and pipes, and of the land occupied by them in each district. Each ratio in the present case gives the same result: if they differed, it would be necessary to select between them; and that ratio should be preferred which would best show the rent to be expected if the part of the works situate in the district was let separate.

It is clear that the net profits in each parish would be the best criterion of such rent; and they would, therefore, give the proper ratio. It is also clear that the ratio of the gross receipts or earnings in the several districts to each other will be the same as the ratio of the net profits in those districts to each other, in all cases where the total of expense is taken to be common to the whole apparatus, and is deducted from the total of receipts in the progress of ascertaining a rateable value. For in such case the net profits in each district would be ascertained by distributing the expense among the several districts; and it would be distributed in the ratio of the gross receipts in each; and, if a proportional deduction should be made from the gross receipts in each, the ratios of the remainders to each would be the same as the ratios of the gross receipts. As any attempt to ascertain the net profits in each district in any other way would lead to minute and inconvenient inquiries in practice, the ratio of the gross receipts should be

*221] adopted, as being an index of the net profits, when the *rateable value is ascertained in the way stated in the case. We think that an apportionment in this sense, according to the gross receipts, is in accordance with the decisions which have apportioned the sum of rateable value from a railway or canal according to the length of line in each parish; *Rex* v. *Kingswinford*, 7 B. & C. 236; *Rex* v. *Woking*, 4 A. & E. 40. Where the profit arises from transit, the line of the canal or railway is directly productive of the profit, and the reservoirs, warehouses, stations, &c., indirectly conduce to such production. Each portion of the line earns an aliquot portion of the profit: and, if equal portions of one line carrying at one rate could be conceived to be let separately, no one portion would be let at a higher rate than the other; and an apportionment of a sum of rateable value according to the length of line in each parish is according to the rent to be expected for that part of the line. In the case of water companies, where the profit arises from the delivery of the water at a given place, the previous transit being immaterial to the consumer, the service pipes immediately produce the profit, and the agency by which the water reaches those pipes indirectly conduces to such production. If the service pipes in each parish could be let separately, the water being assumed to be sold at the same price throughout, the criterion of the rent would be found in the gross receipts, which would depend on the number, and diameter and level of the service pipes in each parish; and an apportionment according to the gross receipts in each district would be accord-

ing to the rent to be expected from the part of the rateable subject situate in such district. This *apportionment is not at variance with the grounds of the judgment in *Regina* v. *The Cambridge Gas Light Company*, 8 A. & E. 73. There the Court decided that the parishes in which the profits are received are not entitled to all the amount produced by the rate, but that the parishes in which parts of the apparatus indirectly conducing to produce profit are situate are entitled to a proportion. The Court also declared that the principle upon which the sum of rateable value from the rates of all the parishes should be apportioned is the same as that which had been applied to canals. By the method adopted in this case, the rateability of the portion of the apparatus indirectly conducing to produce profit is provided for, and the residue of the sum of rateable value is apportioned to those parts of the apparatus directly producing profit, in analogy to the mileage proportion for canals and railways. [*222

We have thus endeavoured to show that the rule for ascertaining the value for separate rating ought to be applied, as far as practicable, to apportioning among separate districts a sum of rateable value arising partly in each.

Order of Sessions quashed, and original rate confirmed.(*a*)

(*a*) Reported by H. Davison, Esq.

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*The QUEEN *v.* The Inhabitants of LITTLE MARLOW. [*223

Relief given by the relieving officer of a union, as on behalf of parish W. to paupers residing in parish M. (both in the union) is no evidence of a settlement in W. without proof that such relief was authorised, or at least known and not objected to, by a guardian of the union acting for W., or by its overseer.

ON appeal against an order of justices removing Helen Reeves and her five children from the parish of Little Marlow in Buckinghamshire to the parish of Wooburn in the same county, the sessions quashed the order, subject to the opinion of this Court upon a special case. The case, after stating the subject and result of the appeal, proceeded as follows.

The said parishes of Wooburn and Little Marlow are parishes comprised within and forming part of the Wycombe Union in the counties of Buckingham and Oxford.

The examinations upon which the said order was made were duly taken on 16th August, 1845, and were, so far as they are material to the present case, as follows. The said Helen Reeves upon her oath said: "I was married twelve years on the 4th day of March last to James Reeves of Wellend in the parish of Little Marlow, Bucks; we were married by banns at Beaconsfield Church, Bucks. My said husband died in April, 1841. In consequence of my said husband's illness, and he being unable to work, I applied to Kingston, one of the

relieving officers of the Wycombe Union in the counties of Bucks and Oxon, for relief. I applied to him whilst he was paying the poor of Wooburn parish, in Wooburn, in the county of Bucks. I applied to him for relief from the said parish of Wooburn, as being the place of settle-
*224] ment of my *husband, and by his directions. He gave me relief about four months before the death of my said husband; and he has given me relief ever since up to the present time; 3s. and seven loaves of bread a week. He told me if I came to him whilst he was paying the poor of Little Marlow in Little Marlow parish, he would give me my relief there instead of my walking to Wooburn parish for the weekly relief. I have always received my relief from Kingston in Little Marlow parish. I have lived in the said parish of Little Marlow all my life, as well all the time I have been receiving relief from Kingston as before."

The examinant Henry Kingston upon his oath said: "I am one of the relieving officers of the Wycombe Union in the counties of Bucks and Oxon. About four years ago the pauper Helen Reeves applied to me, whilst I was relieving the poor of Wooburn in the county of Bucks, for relief for her husband, who was ill. I gave her relief for her husband, and charged it in my account to the parish of Wooburn aforesaid, which relief has been continued and charged to the said parish of Wooburn until the last twelve months, when I received an order from the Board of Guardians to charge the relief to the parish of Little Marlow, which I accordingly did; but did not give the overseers of Little Marlow any notice that the payment had been charged to Little Marlow instead of Wooburn."

At the hearing of the said appeal it was objected by the appellant parish (an objection duly taken by the grounds of appeal) that the said examinations were insufficient to show that the said H. Reeves and her said children were settled in their said parish. The Court thereupon quashed the order upon the merits.

*225] The question for the opinion of this Court was: *whether the examinations, as herein set forth, were primâ facie sufficient to show that the said H. Reeves and her said children were, at the time of making the said order, settled in the said parish of Wooburn. If they were, the order of the Court of Quarter Sessions was to be quashed.

The case was argued in last Michaelmas Term.(*a*)

T. J. Birch and *Sanders*, in support of the order of sessions, contended that relief given by the relieving officer of the Union on behalf of the parish of Wooburn while the paupers resided in Little Marlow was no evidence of a settlement in Wooburn: and they relied on *Regina* v. *Bradford*, 8 Q. B. 571, note (*h*). [COLERIDGE, J. Your argument would nearly destroy all evidence of settlement by relief, where the parishes

(*a*) Wednesday, November 11th, 1846. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and ERLE, Js.

were in a union.] No harm would follow. That evidence is in a great measure destroyed by the regulations of stat. 4 & 5 W. 4, c. 76. Out-door relief, if given otherwise than according to sects. 27, 52, and 54, is, legally no relief: sect. 89 is express as to this. The examinations afford no evidence that the act of the relieving officer was sanctioned by any guardian for Wooburn, or in any way notified to that parish. The importance of this appears from *Regina* v. *Totnes Union*, 7 Q. B. 690. The board of guardians disapproved of the charge on Wooburn. (*Regina* v. *Lilleshall*, 6 Q. B. 158, and *Regina* v. *The Justices of Carnarvonshire*, 2 Q. B. 825, were also cited. The judgment of the Court makes a further report of the argument on this side unnecessary.)

M. Chambers and *Power*, contrà. By stat. 4 & 5 W. 4, c. 76, s. 55, the master of the workhouse, or such other paid officer of [*226 the parish or union as the Poor Law commissioners may direct, is to register in a book, to be provided by the parish or union, and kept specially for that purpose, the relief given to every poor person in the workhouse; and the overseer of every parish is in like manner to register the relief given out of the workhouse. Here the relief was continued for three or four years. Although it may be considered that the mere fact of the officer's charging the relief to one or the other parish in his account might not of itself show knowledge on the part of such parish, the Court must suppose that during a period of three years a book was kept, conformably to sect. 55, and that the overseer made entries of the relief given to these paupers. [COLERIDGE, J. He is to register the relief given "in such parish:" how would the overseer of Wooburn know of relief given in Little Marlow?] Sect. 55 must mean that the overseer of a parish shall register the relief given on behalf of that parish; and the fact would of course come to his knowledge. The Court will presume that each party on whom a public duty in this respect lay performed it. [Lord DENMAN, C. J. The overseers are to register such particulars as the Commissioners shall think fit. Your presumption might arise if it were shown that the Commissioners had ordered a register of the relief to be kept. That does not appear.] *Regina* v. *Bradford* does not govern this case: the only question there was whether the examinations properly showed that the relieving officer was authorised by the respondent parish to relieve the *paupers on its behalf. The [*227 case here is precisely that on which a settlement was established by evidence of relief before stat. 4 & 5 W. 4, c. 76. Paupers residing in a parish from which they cannot be removed, not being chargeable, are relieved on the part of another parish, in which they claim to be settled. That lays upon the parish giving relief the onus of showing that the paupers are not settled there. The facts here proved are at least a scintilla of evidence, by which, if none appears to the contrary, the respondents must succeed. That the machinery for administering relief has been altered by statute, can make no difference:

the relieving officer is the agent of the board of guardians, and among them, of the guardians for the appellant parish: what he does in that official character binds the individual parish. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (February 3d), delivered the judgment of the Court. After stating the subject of the appeal, and the question submitted to the Court, his Lordship said:

It appears by the case that Little Marlow and Wooburn are both in in the Wycombe Union. The deceased husband, with the paupers, were resident in Little Marlow; and, he being ill, his wife went to Wooburn, and applied to Kingston, a relieving officer of the Union, while he was paying the Wooburn poor there, for relief. He gave her relief, and, in order to save her the coming from Little Marlow, told her she might for the future receive her relief from him in Little Marlow when he was, in the course of his duty, paying the paupers of that parish there. This
*228] he accordingly did for some *months during the lifetime of the husband, and subsequently for a period of more than a year. Kingston stated, in addition, that he had charged the relief to the parish of Wooburn till the last twelve months before his examination, when the Board of Guardians had ordered him for the future to charge it to Little Marlow, which he had accordingly done, but had not given the overseers of Little Marlow any notice of the charge.

The point raised upon this statement is, whether there is any primâ facie evidence of relief given by the parish of Wooburn. It was given by the hand of Kingston, the relieving officer: if he was the agent of the parish, and acting within the scope of his authority, or if the fact was brought within the knowledge of the overseers of Wooburn, then it must be taken to have been given by Wooburn. If neither of these propositions is sustainable, then Wooburn cannot be affected.

As the objection was raised upon the examinations, the admissibility of any part of the evidence would of course be questioned at sessions; we cannot, therefore, take notice of any charge on the one parish, or the other, which the relieving officer might have made in his books; for they were not produced; nor is there any statement, if they had been, of their ever having been shown to or brought within the cognizance of the overseers of Wooburn parish. Nor is there any reasonable presumption that they would be present at or know anything about the fact of payment of a pauper in Little Marlow, so as thence to draw any inference against the parish of an admission of settlement. The evidence,
*229] therefore, if any, would accrue from the acts of Kingston *binding the parish, as of an agent acting within the scope of his authority; and it may be that the relieving officer is so appointed, or has such communications with the guardian, or the overseer, of each parish, that an agency of this sort might fairly be inferred. But nothing appears on this case but the simple fact of a relieving officer administering relief: and all that we gather from the statute, 4 & 5 W. 4, c.

76, is, that the relief of the poor in a union is administered by the board of guardians; from which the natural inference is, that the relieving officer is their servant. In some way the guardian representing each parish at the board certainly ought to become aware of the individuals relieved on account of his parish: but on the present statement this is left far too uncertain to be made the ground of fixing the settlement.

And this view is in accordance with that which the Court took in the case of *Regina* v. *Bradford*, 8 Q. B. 571, note (*h*), on the evidence of chargeability afforded by a single act of relief administered by a relieving officer.

We think, therefore, that the sessions were right in their conclusion, and that this rule ought to be discharged.

Order of sessions confirmed.

*The QUEEN *v.* The Inhabitants of EAST STONEHOUSE. [*230

On appeal against an order of removal, the respondents alleging a parish apprenticeship, and ground having been laid for the reception of secondary evidence, the respondents produced the register book of parish C., which contained an entry in the form prescribed by stat. 42 G. 3, c. 46, s. 1, stating that, on 7th April, 1823, W. S., aged, &c., son of, &c., was bound apprentice to R. B., farmer, residing, &c., until the age of twenty-one, by the overseers of C., who were named. In the last column were the words "Magistrates assenting. J. H., L. St. A.", which appeared to be the actual signatures of magistrates so named. The apprenticed party, in his examination, deposed that he was bound apprentice by the overseers of C., and stated the other particulars relating to himself, as given in the register. The sessions held, on objection taken, that the examinations did not contain sufficient legal evidence of the apprenticeship, because they did not show that the justices had made any order for the binding, as directed by stat. 56 G. 3, c. 139, s. 1, though in the opinion of the sessions it did appear that the justices had allowed, by signing and sealing, an indenture which recited an order. And they quashed the order of removal, subject to a case which put the question: Whether sufficient legal evidence of a parish apprenticeship appeared in the examinations. *Held*, that the signature of the justices would have been evidence of an assent under stat. 42 G. 3, c. 46; but that the sessions could not presume from the facts and documents an order or an allowance by the justices pursuant to stat. 56 G. 3, c. 139, s. 1.

ON appeal against an order of justices removing Maria Johns, wife of William Johns, alias William Smith (private in the royal marines, belonging to H. M. ship Pandora), and their children, from the parish of East Stonehouse in the county of Devon to the parish of Milverton in the county of Somerset, the sessions quashed the order, subject to the opinion of this Court upon a special case, the material parts of which are as follows.

The examination, which purported to set up a settlement by apprenticeship, of William Johns, in the appellant parish, showed, in the opinion of the sessions, sufficient search for the indenture of apprenticeship, so that its loss might be presumed and secondary evidence of the binding might be given: and the examinations, so far as they are material with reference to the point in this case, were as follows.

William Johns said: "I resided with my mother, Thomazine Johns,

until I was about ten or eleven years of age, when I was bound out as
*231] a parish apprentice by *the parish officers of Chipstable, in the county of Somerset, to Robert Besley, a farmer, residing in the parish of Milverton in the said county of Somerset, to serve him until I attained the age of twenty-one years." Charles Surrage said: "I am one of the overseers of the poor of the said parish of Chipstable:" "I produce a book, being a register of all the poor children bound apprentice or assigned since the first day of June, 1802, by the overseers of the poor of the parish of Chipstable."(a) "At No. 29 of the said book is the record, under date of the 7th day of April, 1823, of the binding out one William Smith, a male aged ten years, described
*232] as the bastard child of Thomazine Vicary and William Smith, *the mother residing at Chipstable, to Robert Besley, a farmer residing in Milverton, until he attained the age of twenty-one years. The names of the overseers, parties to the said indenture, were John Daveys and James Rogers. The magistrates assenting to the binding, and whose names are affixed, signed by themselves, are John Halliday, L. St. Albyn." The following was the extract from the register book produced by Charles Surrage and sent to the appellants with, and forming part of, the examination.

Register of Parish Apprentices. Parish of Chipstable.

No.	Date of Indenture.	Name of Apprentice.	Sex.	Years of Age.	Name of his or her Parents.	Their Residence.	Name of Person to whom bound or assigned, as the case may be.
29	7th April, 1823.	Wm. Smith.	Male.	10	Bastard Child of Thomazine Vicary and Wm. Smith.	Mother in Chipstable, Father in Taunton.	Robert Baseley.

His or her Trade.	His or her Residence.	Term of Apprenticeship or Assignment.	Apprentice or Assignment Fee.	Overseers parties to the Indenture or Assignment.	Magistrates Assenting.
Farmer.	Milverton.	Until Twenty-one years of age.	None.	John Daveys and James Rogers.	John Halliday. L. St. Albyn.

(a) Stat. 42 G. 3, c. 46, s. 1, enacts (after reciting stat. 43 Eliz. c. 2, s. 5): "That the overseers of the poor of every parish," &c., "shall, from and after," &c., "and they are hereby required to provide and keep a book, or books, at the expense of the said parish," &c., "and to enter or cause to be entered therein, the name of every child who shall be bound out by them respectively as an apprentice, together with the several other particulars, in manner and form required by this act, according to the schedule hereunto annexed; and every such entry, when made in the said register shall be produced and laid before the two justices of the peace who shall signify their assent to the indenture of apprenticeship of every such child, at the time when such indenture shall be laid before such justices for their assent, as required by the said recited act; and each entry in the said register shall, if approved of by such justices, be signed by them according to the form marked in the schedule hereunto annexed." (The schedule is, substantially, in the form set forth in the present case, p. 232, post.)

Sect. 3 enacts: "That it shall and may be lawful for any person or persons, at all seasonable

Thomazine Vicary said: "My maiden name was Johns. Previously to my marriage with my present husband I had an illegitimate child called William Johns. In the year 1823 he was bound as a parish apprentice by the name of William Smith, the name of his father, by the parish officers of Chipstable, to Mr. Robert Besley, a farmer residing on Hurstone Farm in the parish of Milverton."

*The following was the material ground of appeal. That the [*233 examinations are bad because they contain insufficient, illegal and inadmissible evidence of the apprenticeship therein mentioned; and also of the relief, &c.; and because they fail to show by sufficient statement of facts, and by proper and legal evidence of such facts, the place of legal settlement of the said M. Johns and her said children to have been in our said parish of Milverton at the time when the said order was made, and even fail to show that either the said M. Johns or her said husband ever acquired or had a settlement in our said parish. Upon this the appellants objected that the examinations were insufficient, inasmuch as the said William Johns was stated to be a parish apprentice, and it did not appear on the face of the examination that any order of justices had been made declaring the said R. Besley to be a fit person to whom the said W. Johns might properly be bound apprentice, nor that any order was made by the justices that the overseers of Chipstable should be at liberty to bind W. Johns apprentice accordingly; nor (supposing such an order to have been duly made) that the justices making such order signed their allowance of the indenture according to the directions of stat. 56 G. 3, c. 139.

The sessions were of opinion that the said examinations did not contain sufficient legal evidence of a parish apprenticeship, inasmuch as it did not appear on the face of them that any such order had been made, although they were of opinion that it did appear from them that the justices had allowed, by signing and sealing, an indenture, which indenture recited an order; there being at the same time no other evidence that an *order ever was made; and thereupon quashed the order of [*234 removal. The question for the opinion of this Court was: Whether sufficient legal evidence of a parish apprenticeship appeared in the above examinations. If so, the order of removal was to be confirmed and the order of sessions quashed. If not, the order of sessions to be confirmed.

The case was argued last term.(a)

J. Greenwood and *W. C. Rowe*, in support of the order of sessions.

hours, to inspect such book or books in the hands of the said overseer or overseers, and to take a copy of such entry in such book or books, upon payment of the sum of 6*d*., except in case of any of His Majesty's justices of the peace acting in and for the said county, who shall be entitled at all such times to inspect such book gratis; and every such book shall be and be deemed to be sufficient evidence in all courts of law whatsoever, in proof of the existence of such indentures, and also of the several particulars specified in the said register respecting such indentures, in case it shall be proved to the satisfaction of such Court that the said indentures are lost or have been destroyed."

(a) January 20th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

was in *Rex* v. *Whiston*;(a) and the decision in that case is supported by *Rex* v. *Witney*, 5 A. & E. 191. The latitude which the Court will take in presuming acts done by justices to be correct appears also in *Rex* v. *Long Buckby*, 7 East, 45, *Rex* v. *Hinckley*, 1 B. & Ald. 273, 275, and *Regina* v. *Ashburton*, 8 Q. B. 871. In *Taylor* v. *Clemson*, 2 Q. B. 978, a warrant had been issued, under the Manchester and Leeds Railway Act (6 & 7 W. 4, c. cxi., local and personal, public), to summon a jury for the purpose of assessing compensation; and an inquisition thereupon taken was objected to on the plaintiff's part because it did not, even when coupled with the warrant, show expressly that a disagreement had arisen, or that any of the circumstances existed without which, by sect. 138, there was no jurisdiction to issue the warrant. But TINDAL, C. J., said:(b) "If the cases relied upon on the part of the plaintiff are examined, they will all be found distinguishable from the present in this material point, that the omission or want of averment on the face of the proceedings, which formed the objection in those cases, could not be supplied by any intendment from the facts stated in the instrument itself, or from the fact that the order or instrument itself was made:" "it could
*239] not be contended, from the fact of the proceeding *under the statute having taken place, that there had been a performance of the act or condition precedent, the omission to allege which performance on the face of the proceeding formed the ground of objection." "Here, on the contrary, it appears to us that it is impossible, upon reading the warrant and inquisition, to arrive at any other conclusion than this, that the company must have proceeded on the ground that no agreement could be previously made." The same reasoning applies in the present case.

Cur. adv. vult.

Lord DENMAN, C. J., in this vacation (February 10th), delivered the judgment of the Court.

The question in this case was, whether the examinations disclosed sufficient evidence of the binding of one William Johns as a parish apprentice. He had been bound, if at all, since the passing of stat. 56 G 3, c. 139. It was necessary, therefore, to have evidence, not merely of the execution of the indenture, but of the order, and the allowance by two justices, which the statute requires, and of the reference to the order in the indenture, which the statute also requires. Secondary evidence the case finds to have been admissible; and that alone was relied on.

The binding had been from Chipstable, a third parish, into Milverton, the appellant parish; and an overseer of the former parish produced the Register of bindings by that parish, which disclosed all the particulars of date, name, age, master, &c., concluding with these words, "Magistrates assenting," signed by themselves, "John Halliday." "L. St.

(a) See *Doe dem. Nanney* v. *Gore*, 2 M. & W. 320; *Manning* v. *Eastern Counties Railway Company*, 12 M. & W. 237.

(b) Pp. 1034, 1035.

Albyn." It was pointed out in argument that this entry was obviously made in *obedience to stat. 42 G. 3, c. 46, which requires the register to be kept, and gives the form, the last column of which [*240 is headed "Magistrates assenting," with the words underwritten, "to be signed by themselves;" the object of this part of the register being to preserve a record of the particular justices with whose assent any particular apprentice was bound. This entry, therefore, in a case where secondary evidence was admissible, would, on general principles and without reference to the provisions of the third section of the statute, have been evidence of the fact that these two justices had assented to the binding; that the book had been produced to them at the time of their assenting; and that they had then signed their assent. For the entry purports to have been made in compliance with the requisitions of the statute, and therefore, in the case of public functionaries, there would be the ordinary presumption that they had done so.

But it is now sought to carry this presumption much farther, and, because the justices appear to have complied with the requisitions of one statute, it is to be inferred that they must have complied with the very special requisitions of another. Because it is proved that they assented to the binding, which the statute of Elizabeth required, and recorded their assent as stat. 42 G. 3, c. 46, required, therefore it is to be presumed that they made an order under hand and seal for the binding before it took place; that that order was referred to in the indenture by date and the names of the two justices; and that, before execution of the indenture by the parties, the same two justices signed and sealed an allowance thereof. Unless all these things were done no settlement was gained: and the only *ground for presuming them done is that [*241 two magistrates assented to the indenture, and entered their names in the register as having done so. Of these two facts the latter is quite without weight in helping to the inference: and, if all these are inferred from the former, it would be carrying the presumption that all things have been rightly done, as required, much farther than either reason or authority warrant.

The sessions have indeed found that it appeared from these examinations "that the justices had allowed, by signing and sealing, an indenture, which indenture recited an order:" but they state expressly that this was the whole evidence: and upon the whole they were of opinion that there was not sufficient legal evidence of a parish apprenticeship. They therefore leave the question clear for our decision: and we think they were right in the conclusion they drew; and that their order should be confirmed. Order of sessions confirmed.(a)

(a) See *Regina* v. *Stainforth*, Michaelmas vacation, December 11th, 1847, post.

The QUEEN v. The Inhabitants of CHISWICK. [*April* 20, 1844.]

To prove before a removing magistrate that the pauper was bound apprentice by parish officers under stat. 56 G. 3, c. 139, it is not sufficient to put in the indenture itself, and verify the attestation: the order for binding and the allowance of the indenture must also be severally proved: and a due making, so proved, of such order and allowance must appear by the examinations sent with the copy of order of removal.

ON appeal against an order by a Metropolitan Police Magistrate, removing Henry Adams and his wife and child from the parish of St. Giles in the Fields to the parish of Chiswick, both in Middlesex, the sessions confirmed the order, subject to the opinion of this Court on a special case, the material parts of which were as follows.

The case set forth the examination of the pauper Henry Adams, who stated (among other things not now material) that, in July 1827, he was by indenture bound apprentice to George Clark, of, &c., in the parish of Chiswick, Middlesex, tobacco-pipe-maker, and served, &c.: and the examination of Thomas Harvey, who stated: That he now here produces the *indenture of apprenticeship, under the hands and seals of the churchwardens and overseers of the poor of St. Giles in the Fields in Middlesex of the one part, and of George Clark of the other part, bearing date July 21st, 1827, whereby the said H. Adams was then bound apprentice to G. Clark, &c.; and the deponent verified the signatures of the churchwardens and overseers, and of the subscribing witness, John Davies, deceased, to the indenture. The case stated that copies of the examinations, order of removal, and notice of chargeability, were duly served.

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The grounds of appeal were: That the order of removal and the examinations are, and each of them is, bad on the face and faces thereof respectively.

That the examinations are bad and insufficient, inasmuch as the pauper H. Adams was a parish apprentice, and it does not appear upon the face or faces of the examinations that he, H. A., was, before he was bound apprentice, carried before the justices of the peace of the county, &c., wherein the parish of St. Giles in the Fields was situate, who might inquire into the propriety of binding him apprentice to G. Clark: nor that any order of justices was made declaring that G. Clark was a fit person to whom H. A. might be properly bound an apprentice: nor that any order was made by the said justices that the overseer or overseers of the place to which such child belonged should be at liberty to send such child apprentice accordingly: nor (supposing such order to have been duly made) that the justices making such order signed their allowance of the said indenture, according to the directions of the statute in such case, &c.

"It appeared to the satisfaction of the Court that the indentures, duly allowed, and with the proper order annexed, had been produced to the justices" (sic) "on obtaining the order of removal, and that the execution of the indentures had been duly proved before such justices; and on the face of these documents it appeared that the order had been duly made, and that the allowance by the justices had been duly obtained, and that a settlement had been gained in Chiswick under the indentures by the pauper.

"The only question raised at the sessions was, not whether a settlement had been gained, but whether, before the removing magistrate, it had been duly proved. The making of the order for binding, and the allowance of the indenture, were not proved before the removing magistrate otherwise than by proof of the due execution of the indenture, the production of the order and allowance of the justices, and by the recitals in the indenture, and by proof of the handwriting of one John Davies, deceased, a subscribing witness. Respondents contended that this attestation might apply both to the handwriting of the magistrates' allowance and the handwriting of the master of the apprentice, and pointed out that allowance by the magistrates precedes the execution of the indentures by any of the other parties thereto.

"The Court were of opinion that the execution of the indenture had been duly proved before the removing magistrate, and that there was no *necessity for noticing in the examination that such order had been made, or such allowance of the indentures obtained, and thereupon confirmed the order. The indenture, order and allowance were produced before the removing magistrate, and they form part of the case."

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The question for the opinion of this Court was: "Whether the examinations were sufficient whereon to ground the order of removal, and whether any objection sufficient to invalidate the same is raised by the grounds of appeal. If the examinations were sufficient to authorise the removing magistrate to adjudicate, or if no sufficient objection be raised by the grounds of appeal, then the judgment of the quarter sessions to be confirmed; otherwise the appeal to be allowed"

The case set out a copy of the indenture, commencing as follows:

"Middlesex," &c. "This indenture, made," &c., (21st July, 1827), "witnesseth that William Parker," &c. (the churchwardens and overseers), "have, in pursuance of an order of Henry Moreton Dyer and Frederick Adair Roe, Esquires, two of His Majesty's justices of the peace of the said county, bearing date the 21st day of July, 1827, and by and with the consent of the said two justices, and their allowance of this indenture, hereunto subscribed, and signed by them the said justices before the execution thereof by any of the other parties hereto, put and placed, and by these presents do put and place, Henry Adams," &c. "In witness whereof," &c., "George Clark (L. s.) witness, John Davies." The case then set out copies of the order for binding and of the allowance, both of the same date with the indenture, and each subscribed "H. M. Dyer (L. s.) F. A. Roe (L. s.)" The latter was as follows. "We, whose names are hereunto subscribed, two of His Majesty's justices," &c., "do consent to the putting forth Henry Adams, mentioned in this indenture, apprentice, according to the intent and meaning of the said indenture. And we do sign this our allowance thereof this 21st day of July, 1827, and before the execution of the said indenture, by any of the other parties thereto."

(It appears, by a brief in the case that the indenture, order and allowance were all on one sheet of paper.)

Adolphus, in support of the order of sessions. The examinations are sufficient. The indenture, order and allowance practically form one document; and the attestation of the subscribing witness to the indenture authenticates the whole. There was, therefore, sufficient evidence before the removing magistrate; and the examinations fully informed the appellants of the case they had to meet.

Prendergast, contrà. It was not sufficient that execution of the indenture was proved before the removing magistrate; the order for binding and the allowance should have been separately verified; and the due execution of them should have appeared by the examinations. Even if the examinations had stated generally that such documents were executed, this would not have supplied the place of regular proof. Many cases on stat. 56 G. 3, c. 139, s. 1, have turned upon the question whether or not each distinct step required by that clause [*244 was properly traced in evidence. If proof of any step might be dispensed with before the removing magistrate, it might also be omitted before the court of appeal. In 1 Nol. P. L. 597 (4th ed.), it is laid down that, "In the case of parish apprentices, the assent of two justices is necessary; and if given in writing, the signature must be proved in the same manner, and subject to the same rules as the execution of indentures." (He was then stopped by the Court.)

Lord DENMAN, C. J. We cannot but see that this is a good objection.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred. Order of sessions quashed.

The QUEEN *v.* The Recorder of LEEDS. *Feb.* 13.

Reported, 8 Q. B. 623.

JOHN BOND and HARRIET his Wife, *v.* NURSE and HAND. *Feb.* 13.

Stock was bequeathed in trust to pay H., a married woman, the accruing dividends for her sole use; her receipts to be the only good discharges to the trustees. The trustees received a dividend, and informed H. that the sum was lodged with their agents, and would be paid to her on her signing a receipt, and on execution by her and her husband of a deed prepared under an order of the Court of Chancery, relating to the trust affairs. H. and her husband did not give the receipt or sign the deed: and, the dividend not being paid, they brought an action for money had and received.

Held, that the deposit with the agents, and notice to H., were not such an appropriation and admission of a balance as made the amount demandable from the trustees without giving H.'s receipt: and that the refusal to give such receipt justified them in withholding the dividend, though they had also demanded, as a condition of payment, execution of the deed, which they had no right so to enforce.

ASSUMPSIT for money had and received to the use of plaintiffs in right of the wife, and for money found due to plaintiffs in her right on an

*245] *account stated between plaintiffs and defendants. Plea, Non assumpsit.

On the trial, before Lord DENMAN, C. J., at the London sittings after Michaelmas term, 1845, it appeared that the father of the female plaintiff devised part of his property to trustees, to sell, and to stand possessed of the proceeds on the trust (among others), as to 2000*l.* of such proceeds, to invest the same in their names in the public funds, and to receive the dividends, and pay them, from time to time as received, to his said daughter, the plaintiff, for and during the term of her natural life; and the testator declared that such dividends should be for her sole and separate use, free from the control, debts and engagements of her then present or any future husband; and that her receipts for the said dividends should be the only good discharges to the trustees. He also appointed the trustees and his wife executors and executrix. On his death the trustees disclaimed the estate and trusts; and the widow administered. A suit in Chancery, relating to the will and administration, was commenced by one Thomas Hollick and his wife against the present plaintiffs, and others, and an injunction prayed for against the widow: and, ultimately, by arrangement among the parties, an order of Court was made in the suit, under which order a deed was prepared (dated February 23d, 1844), appointing the widow and the now defendants (who survived her) trustees to execute the trusts of the will. The now plaintiffs were named as parties to the deed, but did not execute it. It was, however, duly executed by the other parties.

In 1845 (after the death of the testator's widow), the defendants' solicitors, at Nuneaton in Warwickshire, wrote to the plaintiff Mrs. Bond as follows.

*246] *"Dear Madam, "Nuneaton, July 24th, 1845.

"The half year's dividend upon the 2000*l.*, due the 5th inst., has been received by Messrs. Hand and Nurse, amounting to 29*l.* 2*s.* 6*d.*" "It is necessary you should sign a receipt for these dividends, as they become payable; and probably by another half year you will arrange to do so. We have sent the money and receipt to Messrs. Sudlow, Sons & Torr, 20 Chancery Lane, where you must please to call for it. We have also sent up the deed of appointment of Mr. Hand and Mr. Nurse as trustees, for your signature and Mr. Bond's, inasmuch as the Master, by the direction of the Court of Chancery, has directed you and Mr. Bond to be made parties to it, and therefore, without your signatures, the trustees have no authority to pay you the dividends, and they can only act by the directions of the Court. We are," &c.,

"J. W. & G. CRADDOCK."

On the 5th August, the solicitors for the plaintiffs wrote to the defendant Hand, desiring information as to the investment of 2000*l.*, and requesting that, if the dividend had been received, it might be paid to Mrs. Bond's use. They also wrote to Messrs. Sudlow & Co. for a draft

of the deeds relating to the appointment; which the latter sent, and wrote as follows (August 9th, 1845).

"We beg to state that half a year's dividend on the 2000*l.* is in our hands ready to be paid over to Mrs. Bond on her executing the deeds which she is aware of. The 2000*l.* has been invested in the names of all the trustees. The particulars of the investment we are not acquainted with, but will ascertain and inform you. We are," &c.

"SUDLOW, SONS & TORR."

*On 22d August, 1845, Messrs. Craddock wrote to the plaintiffs' solicitors, giving some particulars as to the investment, and [*247 stating that the dividend was in the hands of Messrs. Sudlow & Co., "ready to be paid to Mrs. Bond upon her own receipt, and execution of the trust deed by herself and Mr. John Bond." The plaintiffs' solicitors, in reply (23d August, 1845), put the following questions.

"When was the legacy of 2000*l.* sterling invested, and what amount of stock did the same purchase?" "Do your clients, the trustees of the fund as stated by you, object to pay the dividends to Mrs. Bond upon the receipt unless she executes the deed of arrangement, in which the names of Mr. and Mrs. Bond were introduced, and to which they were made parties, without any authority or without being consulted on the subject? We are," &c.

"MARDON & PRITCHARD."

Messrs. Craddock wrote in answer (August 29th, 1845), giving particulars as to the purchase of 2000*l.* stock, and adding, "There is now 2000*l.* stock vested in the names of the trustees for the benefit of Mrs. Bond, which cost 2000*l.* exactly; the half year's dividend upon which has been paid in one sum: and the trustees do not object to pay Mrs. Bond the dividend if she will sign the receipt sent; but this she refuses to do, without any reference to the deed of arrangement. We are," &c.

The deed remaining unexecuted, and the dividend being unpaid notwithstanding a further application by Messrs. Mardon & Pritchard (which they stated to be made by instruction from Mrs. Bond), this action was *commenced. The Lord Chief Justice was of opinion [*248 that the facts did not warrant an action at law by the husband and wife against the wife's trustees; and he directed a nonsuit, giving leave to move to enter a verdict for the plaintiffs for 29*l.* 2 *s.* 6*d.* *Knowles*, in Hilary term, 1846, moved accordingly, and cited *Roper* v. *Holland*, 3 A. & E. 99;(*a*) *Atkins* v. *Hill*, 1 Cowp. 284; and *Hart* v. *Minors*, 2 Cro. & M. 700; S. C. Tyr. & G. 990. A rule nisi was granted. In this vacation,(*b*)

Hill showed cause. *Roper* v. *Holland* is distinguishable from this case. There the defendant, being in the receipt of money as trustee for the plaintiff, admitted that 27*l.* had come to his hands for the plaintiff's

(*a*) See *Pardoe* v. *Price*, 16 M. & W. 451, 459.

(*b*) February 4th. Before Lord DENMAN, C. J., PATTESON and WIGHTMAN, Js.

use, and said he was ready to pay it by giving 10*l.* in money and taking credit for the residue on account of certain repairs: he had paid the money into a bank, and directed the clerk to offer the plaintiff 10*l.* on his giving a receipt for 27*l.*; and this was held to be a statement of account, and an appropriation of 10*l.* to the plaintiff's use, on which the defendant, though a trustee, might be sued at law for the 10*l.*, the plaintiff not having offered a receipt, and the 10*l.* being unpaid. But here the trustees have not admitted holding any sum as payable absolutely. They never proposed to pay any part of the 27*l.* 2*s.* 6*d.* without having Mrs. Bond's receipt for it, which the deed entitled them to demand. In the earlier letters they required also that she should sign the deed of February 23d; but on August 29th

*249] they write; "the trustees do not object to pay Mrs. Bond *the dividend if she will sign the receipt sent;" adding no other condition: and the action is brought without any offer on her part to sign. *Roper* v. *Holland* was recognised as an authority in *Edwards* v. *Bates*, 7 M. & G. 590, where CRESSWELL, J., cited the words of Lord DENMAN, C. J., in the former case; "If this was an open account, it was a trust account;" and again, in giving judgment, observed: "This is, palpably, an open trust; under which several things remained to be done by the defendants," the trustees. Here, in like manner, the trust to pay half a year's dividend necessarily remained open till the trustees were guarded from responsibility by Mrs. Bond's receipt. It was in their discretion to withhold payment. *Bartlett* v. *Dimond*, 14 M. & W. 49, is an authority against the maintenance of an action at law in such a case. *Atkins* v. *Hill* turned upon the unqualified promise of an executor in consideration of assets. *Hart* v. *Minors* was a similar case; and the plaintiff there was a person sui juris: here the husband and wife are proceeding for the wife's separate property. The distinction is important; for, if the parties applied to a Court of equity, as the defendants contend they ought, the husband would not be permitted to join as a plaintiff, but the wife must file her bill by her next friend; *Sigel* v. *Phelps*, 7 Sim. 239; and a Court of Equity in that case would direct such other steps as were necessary to prevent the trustees from being improperly prejudiced. In *Davison* v. *Atkinson*, 5 T. R. 434, this Court held that a husband ought not to sue at law for money conveyed to the sole use of his wife and impro-

*250] perly paid over to another person, *because his interest in respect of it is opposite to hers, and his recovery would interfere with her separate right; and GROSE, J., said that the husband could not recover such money in a Court of Equity. In this case, therefore, if the plaintiffs succeeded, the defendants might pay the husband and then be sued in equity by the wife. That she is formally joined in the present action would make no difference; the action is the husband's only; the wife being the meritorious cause, he was at liberty to join her if he thought fit; *Philliskirk* v. *Pluckwell*, 2 M. & S. 393. (He also

contended that neither count of the declaration was applicable to the alleged cause of action: but it became unnecessary to decide this point.)

Knowles, contrà. The action at law was maintainable at the suit of both plaintiffs or of the husband alone. *Davison* v. *Atkinson* was the case of a mere equitable right; there were trustees whose duty it was to protect the wife's interest: and her husband could not avail himself of it by suing in his own name. Here the question is whether a legal right has not accrued. The trustees, by stating that they held a specific sum to the wife's use, and by actually transmitting it to their agent in London for the purpose of payment, have made the account, as to that sum, no longer an open but a closed one. *Roper* v. *Holland* applies: the husband is at liberty to bring an action at law in his wife's right, and may join her as a plaintiff. The test, on this latter point, was stated in *Ayling* v. *Whicher*, 6 A. & E. 259, to be, whether in any event the right of action would survive to the wife; here it would; therefore she is well joined. The rules *of equity on this subject can have no weight, [*251 if a legal right has attached. The present case is put by the defendants as if the will made it an indispensable condition of any payment to the wife that she should sign a receipt; but the testator merely says that her receipts shall "be the only good discharges" to the trustees. It is not laid down in *Roper* v. *Holland* that the acknowledgment, to give a right of action against trustees as on a closed account, must be absolutely unconditional: indeed the admission there was even less so than in the present case. And the defendant there claimed nothing but a receipt which it seems he was fully entitled to: here the defendants, by their solicitors, claim not only Mrs. Bond's receipt, but her signature and her husband's to the deed of appointment, a condition which they have no right to impose. It is true that, in the letter of August 29th, this is omitted: but before that time the money had been sent to the agents in London, to be paid only on fulfilment of both conditions; and it does not appear that those instructions had been revoked.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

We are of opinion that this case does not fall within the authority of *Roper* v. *Holland*, in which the Court considered the defendant, the trustee, as having stated an account with the plaintiff, his cestui que trust, and admitted himself to be his debtor in the amount mentioned. But here the defendants were not bound to pay the dividend which they had received to the *wife's use, and indeed were bound to keep it [*252 for her, until they obtained her authority in the form of her sole and separate receipt; their express duty being to secure her property against her husband. The letters were supposed to make some difference in this respect, as the defendants had made it a condition of their paying that the plaintiff and his wife would execute a deed prepared by order of the Court of Chancery, which they certainly had no right to require.

But this did not vary their right to withhold the money from the plaintiff till his wife's receipt was produced to them. Rule discharged.

TURNER *v.* AMBLER. *Feb.* 13.

In an action for malicious prosecution, the facts material to the question of probable cause must be found by the jury; and the judge is then to decide, as a point of law, whether the facts so found establish probable cause or want of it:

Among these facts are the defendant's knowledge of the alleged ground of accusation at the time when he prosecuted; and his belief, at that time, that the conduct forming such ground of accusation amounted to the offence charged.

If the defendant did not so believe, the want of reasonable and probable cause is established, though the imputed offence appear primâ facie to have been committed by the plaintiff, and the fact to have been known to the defendant, before the charge was made.

The absence of belief must be proved by the plaintiff. And, if it be not proved, the defect is not supplied (for the purpose of showing want of probable cause) by evidence that the defendant made use of the charge as a means of obtaining an unfair advantage over the plaintiff.

CASE. The declaration charged that defendant falsely, maliciously, and without reasonable or probable cause, charged plaintiff before an alderman and justice of the city of London with having feloniously stolen a cistern, a branch of lead pipe, a patent range, and other articles named, being defendant's property and fixtures let by defendant to plaintiff with a dwelling house (describing it); against the statute in such case, &c.: *253] that defendant, falsely, &c., caused and *procured the alderman to make his warrant, &c., and the plaintiff to be arrested, &c.: examination and remands of the plaintiff, and his committal for trial at the Central Criminal Court: that, at the Sessions there, August, 1844, defendant falsely, maliciously, and without reasonable, &c., caused plaintiff to be indicted for the said supposed offence, and prosecuted such indictment until plaintiff afterwards, to wit, &c., was acquitted, and by judgment of the said Court discharged, &c. Plea, Not Guilty.

On the trial before Lord DENMAN, C. J., at the sittings in London after Michaelmas term, 1845, it appeared that the defendant, in 1844, let the above mentioned house, with the fixtures, to the plaintiff, by written agreement, for a term of years, at the rent of 160*l.* The plaintiff, shortly afterwards, began to make alterations in the premises, and, while so doing, removed the fixtures in question, which by the agreement he was bound to deliver up at the end of the term, and from time to time sold them. For this removal and sale the now defendant caused the plaintiff to be apprehended and indicted as a felon under stat. 7 & 8 G. 4, c. 29,(*a*) at the Central Criminal Court, where he was tried and

(*a*) Stat. 7 & 8 G. 4, c. 29, s. 45. "And, for the punishment of depredations committed by tenants and lodgers, be it enacted, That if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging," "every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture

acquitted. On the plaintiff's evidence *in the present action, it appeared that, during the time in question, he was materially changing the condition of the premises, subdividing them, and converting a part into slaughter-houses, and that his rent, when due, was unpaid; and the suggestion was that the now defendant had apprehended and prosecuted the plaintiff with a view to get rid of him as a tenant (which it appeared he had made some endeavour to do while the plaintiff was in custody, by application to his subtenants), and not because he really thought him guilty of felony. With respect to the fixtures, it was represented that they were of little use or value; that the plaintiff was laying out considerable sums on the premises; that, in the course of his improvements, he had removed and disposed of these articles without any criminal intention; and that this must have been known to the plaintiff from the witnesses he himself called in support of the prosecution. At the close of the plaintiff's case, the defendant's counsel contended that there was no evidence to go to the Jury, it being clear that the plaintiff had done acts which are made felony by stat. 7 & 8 G. 4, c. 29, s. 45. The Lord Chief Justice said that he did not perceive any evidence of malice, even assuming that the defendant had been mistaken in prosecuting: but, after hearing the plaintiff's counsel, he declined to nonsuit; and the counsel for the defendant addressed the Jury, but called no witness. The Lord Chief Justice, in summing up, left it to the Jury to say [*254

whether the defendant had acted maliciously, and, with reference to that question, whether the evidence showed, in point of fact, such a want of probable cause for the prosecution as amounted to proof that the defendant had instituted it from motives of malice. But (adverting to *Panton* v. *Williams*, 2 Q. B. 169), he reserved the question of probable cause, as distinct from that of motive, to be decided by himself, if necessary, as a question of law. The Jury found for the plaintiff, with 80*l.* damages. The Lord Chief Justice then gave his opinion that, in point of law, no want of reasonable or probable cause appeared on the case proved; and he therefore directed a verdict to be entered for the defendant, giving leave to move to enter a verdict for the plaintiff with 80*l.* damages. [*255

Hill, in the ensuing term, moved for a rule to show cause why the verdict should not be so entered, or a new trial had. He contended that it ought to have been left to the jury (and might so have been, consistently with *Panton* v. *Williams*, 2 Q. B. 169), not only whether there were any facts which could be a probable cause for the prosecution, but also whether the defendant did not know that the facts which prima facie might be such cause, were in reality none,(*a*) this knowledge being

to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

(*a*) On the materiality of the defendant's knowledge and belief as a question for the jury, *Hill* read a passage from the judgment of the Exchequer Chamber in the above case, where TINDAL, C. J., after citing the rule that "it is a question for the jury, whether the facts brought forward in evidence be true or not; but that what is reasonable or probable cause is matter of law,"

"he must allege as a ground of defence, that which is so important in proof under the plea of Not guilty, viz. that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas it is quite consistent with the allegations in this plea, that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavours to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made." [Lord DENMAN, C. J. The principle stated there is important; and *Broad* v. *Ham*, 5 New Ca. 722, is also much in your favour. If those cases had been cited, I should have left it to the jury to say *whether or not the defendant believed the felony had been committed. But the case went to them, not distinctly on that point, but on the general question whether the defendant acted on such a belief or on a different motive.]

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Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; and also the defendant's belief that the facts amounted to the offence which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding: and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred.

In the present case, the plaintiff certainly dealt with the defendant's goods in such a manner as could hardly fail to raise a strong suspicion that he had committed a felony. On this the Judge gave his opinion that there *was reasonable and probable cause for the prosecution. The defendant's knowledge of this could not be made a matter of doubt. But the plaintiff imputed to him on the trial that he took unfair advantage of the irregular conduct of the plaintiff to turn him out of possession of his house, without believing that a felony had been committed; and he pointed to the defendant's eagerness to get rid

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of him as a tenant, as furnishing evidence, not of his motive, but of his opinion.

It is difficult to distinguish between this state of mind and malice: but the Court of Common Pleas, in a late decision,(a) sustained a direction that the defendant, though cognisant of reasonable and probable cause, did not think it reasonable and probable, but acted from malicious motives only, and without that belief. That doctrine must, however, be qualified by the necessity of requiring *proof of the absence of that belief*, when reasonable and probable cause is established. There was none such here. I was not required to lay it before the jury; and, if required, I could not have done so. The unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable or probable cause; for the contrary belief is perfectly consistent with malice.

Rule discharged.

(a) See *Broad* v. *Ham*, 5 New Ca. 722.

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*SAMUEL *v.* GREEN. *Feb.* 13. [*262

Defendant, wanting money, desired T., a discount agent, to procure him 160*l.* on discount. T. asked for security; and defendant gave T. his check for 160*l.*, payable to T. or bearer, saying that T. must get him the money "by hook or by crook." T. then said he would see a friend, and try to get defendant the money; and he afterwards obtained the money from plaintiff, handed him the check, paid over the money to defendant, and at the same time received 15*l.* from defendant for discount, of which he kept 7*l.* and paid 8*l.* to plaintiff. Defendant afterwards requested time for payment of the check; and T., without referring to the plaintiff, gave time. Defendant, requiring still further delay, wrote to T., "tell your friend I want his money till Christmas, and am willing to pay for the accommodation. Let me know what he will do for me." During these transactions, T. did not mention any lender by name to the defendant.

In an action of debt on the check, averring delivery of it to plaintiff; plea, that defendant delivered the check to T.; that, save as aforesaid, there never was any delivery of it by defendant: and that T. delivered it to plaintiff; without this, that defendant delivered it to plaintiff in manner, &c.: issue thereon:

Held that, on the above evidence, a jury was warranted in finding a delivery of the check by defendant to plaintiff.

DEBT. The declaration stated that defendant, on 1st December, 1845, made his draft or order, &c., called a banker's check, and directed the same to Messrs. Cockburns & Co., and thereby required the said C. & Co. to pay Mr. Edward Tucker or bearer 160*l.*, and then delivered the same to plaintiff, who is still the bearer thereof: non-payment by C. & Co., though the check was presented to them: notice to defendant.

Plea 2. That defendant, to wit, on the said 1st December, 1845, delivered the said draft or order to the said E. Tucker in the said draft or order named, and that, save as aforesaid, there never was any delivery of the said draft or order by the defendant: and the said E. Tucker afterwards, to wit, on the day and year last aforesaid, delivered the same to the plaintiff: without this that the defendant delivered the said

draft or order in writing in the said first count mentioned to the plaintiff, in manner and form as therein alleged: conclusion to the country. Issue thereon. There were also a plea denying notice of presentment and dishonour, and *concluding to the country, on which issue was joined; and other pleadings, which it is unnecessary to state.

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On the trial, before Lord DENMAN, C. J., at the Kingston Spring assizes, 1846, the facts bearing on the first mentioned issue appeared as follows. The defendant applied to Tucker, a discount agent, to procure him money on discount: Tucker said "money was dreadfully scarce," and asked defendant for security; and defendant then gave him the check in question, drawn by defendant on Messrs. Cockburns & Co., payable to "Mr. E. Tucker or bearer," saying to Tucker that he must get defendant the money "by hook or by crook." Tucker asked for collateral security; and defendant gave him, in addition, a bill of exchange, drawn by defendant upon and accepted by one Hull, payable to defendant's order and indorsed by him; but on which nothing material turns. Tucker then said he would see his friend, and try to get defendant the money. He afterwards saw the plaintiff, obtained the money from him, and handed to him the bill and check. Defendant received the money, and said the check was to be presented in a week. Tucker (by agreement with defendant) received back 15*l.* for the discount, which he divided with the plaintiff, paying him 8*l.* and retaining 7*l.* for himself. The defendant afterwards requested further time for payment; and Tucker gave it, without referring to the plaintiff. Tucker said, in evidence at the trial, "Mr. Samuel leaves these things entirely to me." The defendant subsequently made a further application for time, by a letter to Tucker, containing these words: "Will you tell your friend I am sorry for the irregularity, but it was unavoidable? I want his money till over Christmas, and am willing to pay for the accommodation." "Let me *know what he will do for me, and until what day." Tucker said, on cross examination, "I do not know that I told the defendant the name of the person who was to advance the money."

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It was objected for the defendant that no privity was shown between him and the plaintiff, the transaction proved being with Tucker; and consequently that an action of debt did not lie. The Lord Chief Justice reserved leave to move (according to arrangement between the parties) that a nonsuit might be entered, if the Court should hold that there was no evidence for the jury on the plaintiff's part upon the issue first above mentioned: and the case went to the jury on the question of notice. Verdict for plaintiff; damages 160*l.* *Lush*, in the ensuing term, obtained a rule nisi for a nonsuit.

Peacock now showed cause. The objection is that debt, on a check, can be maintained only between the immediate parties; and that the evidence here shows no delivery of the check by the defendant to the plaintiff, and therefore no immediate connection between them, such as

the action requires. But Tucker dealt only as agent for the plaintiff; the check was delivered to him in that capacity, and not for the purpose of making him the legal holder: he gave no consideration: the check was handed to him that he might get the money upon it "by hook or by crook." [PATTESON, J. You say that, if Tucker was agent for the plaintiff, the defendant's delivery to Tucker was a delivery to the plaintiff: if Tucker was agent for the defendant, Tucker's delivery to the plaintiff was a delivery by the defendant to the plaintiff.] It is so. It was as if the check had been sent by a servant. *Then there was no evidence for the jury in support of the defendant's issue on the second plea. The defendant's letter to Tucker makes the case against him conclusive. [*265

Lush, contrà. There was no evidence of Tucker being the defendant's agent. In all the proceedings upon which this action is founded, the defendant dealt with Tucker. Tucker was a discount broker, and received a commission from both parties. He managed the presentment of the check. The individual party, now plaintiff, does not distinctly appear in the transaction till a default has been made in payment. And the letter on which stress has been laid was not written till after the money had become due. [WIGHTMAN, J. Suppose the defendant had handed the check to Tucker, and said, "If you can get me discount from any body, I will give you 10*l*."] That is not the state of facts here. The defendant does not appear to have known that Tucker was not to keep the check in his own hands. [WIGHTMAN, J. Saying "you must get me the money by hook or by crook" rather intimates that the defendant did not look upon Tucker as the man who was to lend it.] It must be presumed from the defendant's giving the check to Tucker that he was meant to be the holder. [PATTESON, J. "You must get me the money" does not imply that.] It is the constant course with money-lenders to profess that they do not advance the money themselves, but raise it. [Lord DENMAN, C. J. Yes; it is a well known way of dealing for the money-lender to say that he has an unconscionable friend in the neighbourhood. But the question is, whether, on the evidence here, that friend is not the holder of the check.]

*PATTESON, J. I think Tucker was only the defendant's agent, and not the holder of the check. The rule must be discharged. [*266

COLERIDGE and WIGHTMAN, Js., and Lord DENMAN, C. J., concurred.

Rule discharged.

HILLS and Another *v.* MESNARD and Another. *Feb.* 25.

To a declaration in assumpsit by payees against acceptors of a bill for 419*l.* 2*s.*, alleging non-payment to plaintiff's damage of 500*l.*, defendants pleaded:

1. As to 4*l.* 18*s.*, parcel, &c., payment of 5*l.* into Court, which plaintiffs accepted.
2. As to the residue of the sum in the declaration mentioned: That plaintiffs, as brokers, had sold property for one H. for a sum exceeding the said residue, viz. for 415*l.* 12*s.* 6*d.*, to be

paid to plaintiffs, as H.'s agents, on a future day: that, after the sale, H. asked plaintiffs to advance him the 415*l.* 12*s.* 6*d.*, and they agreed to do so if H. would procure defendants to accept a bill drawn upon them by plaintiffs for 419*l.* 2*s.*, and plaintiffs agreed and promised defendants and H., that plaintiffs would appropriate the purchase money, when received by them, towards payment of the bill, if defendants should accept: That defendants, confiding, &c., did, for the accommodation of H., and without any consideration, accept the bill declared upon; and plaintiffs thereupon advanced the 415*l.* 12*s.* 6*d.*: And that the purchase money, to that amount, afterwards and before the bill was due, became payable, and was received by plaintiffs as brokers for H., and is in their possession, to be appropriated, &c., and was sufficient to pay the residue and all damages by non-performance of the promise in the declaration mentioned. Replication, De injuriâ: issue thereon.

3. As to the said residue, &c.: payment by defendants to plaintiffs, before the bill became due, of a sum exceeding such residue, viz. 415*l.* 12*s.* 6*d.*, and acceptance thereof by plaintiffs, in full satisfaction of the promises, &c., as to the residue, and of all damages by the non-performance thereof as respects such residue, &c. Replication denying the payment and acceptance: issue thereon.

The facts, as stated in plea 2, having been proved at the trial (when it appeared that the 415*l.* 12*s.* 6*d.* was the price of railway shares sold for H., and that the bill was drawn for 419*l.* 2*s.* to cover interest accruing between the settling day for the shares, and the maturity of the bill):

Held that the second plea showed a good defence; and that the receipt by plaintiffs of the 415*l.* 12*s.* 6*d.*, under the agreement, was, as alleged in the third plea, a payment by defendants to plaintiffs.

And that plaintiffs could not set up against defendants, in reduction of such payment, a charge for brokerage on the purchase of the same shares, which H. had agreed to pay plaintiffs if the shares sold for 415*l.* 12*s.* 6*d.*

Held also, on motion for judgment non obstante veredicto on the second and third pleas, because they gave no answer as to the damages: That the "residue" mentioned in those pleas might be taken to mean the amount of the bill, minus the sum paid into Court, and with the addition of such damages as the jury might give, not exceeding 500*l.* And, therefore, that the payments alleged and proved might be considered, after verdict, as covering the whole demand to which they were pleaded.

ASSUMPSIT on a bill of exchange drawn by plaintiffs on defendants, requiring them to pay to plaintiffs' order 419*l.* 2*s.*, two months after date, *267] *accepted by defendants, and not paid when due; to the damage of plaintiffs of 500*l.*

Pleas. 1. As to 4*l.* 18*s.*, part of the sum in the declaration mentioned, payment of 5*l.* into Court, which the plaintiffs accepted.

2. As to the residue of the sum in the declaration mentioned, that, before the making and accepting of the bill, plaintiffs were and carried on the business of brokers, and, as such brokers, and as agents for one Charles Isaac Humble, and sold for the said Humble certain property of him, Humble, for a certain large price and sum of money, exceeding the said residue, &c., to wit, for 415*l.* 12*s.* 6*d.*, which said price and sum was to be paid to plaintiffs for and as the agents of Humble on or before a certain future day which would be before the said bill would become due, to wit, on or before, &c. And that, the said Humble having, after the sale aforesaid, to wit, on, &c., made an application to plaintiffs to advance him the said sum of money, to wit, the said 415*l.* 12*s.* 6*d.*, being the said price and sum by them to be received as the agents of and for Humble as aforesaid, plaintiffs thereupon then agreed with Humble to advance him the said sum, to wit, 415*l.* 12*s.* 6*d.*, so by plaintiffs to be received as aforesaid, if Humble would procure defend-

ants to accept a certain bill of exchange for 419*l.* 2*s.*, to be drawn by plaintiffs upon defendants: and plaintiffs then agreed and promised the said Humble and also the said defendants, that they would apply and appropriate the said price and sum, when and so soon as the same should be paid to and received by them the said plaintiffs, towards the payment of such bill of exchange, if defendants should so accept the same aforesaid. Averment, that defendants, *confiding, &c., afterwards, to wit, on, &c., for the accommodation of Humble, and without any consideration whatever in that behalf, accepted the said bill in the declaration mentioned, drawn, &c.; and plaintiffs thereupon then advanced to Humble a certain sum of money, to wit, 415*l.* 12*s.* 6*d.* Further averment, that afterwards, and after the said bill was so accepted by defendants as aforesaid, and after plaintiffs had thereon advanced to Humble the said sum as last aforesaid, and before the same became due and payable, to wit, on, &c., the price and sum first aforesaid, to wit, 415*l.* 12*s.* 6*d.*, for the property of the said Humble, became and was payable and was paid to plaintiffs as brokers and agents for Humble, and was by them received for and on account of Humble, and is still in their possession, to be by them applied and appropriated towards the payment of the said bill as aforesaid. Further averment, that the sum so paid to plaintiffs, and by them received for and on account of Humble, was sufficient to pay and satisfy the said residue of the sum in the declaration mentioned, and all damages by the plaintiffs incurred by reason of the non-performance of the promise in the declaration mentioned. Verification. [*268

Replication, De injuriâ. Issue thereon.

3. As to the said residue of the sum in the declaration mentioned, that, after the acceptance, &c., and the promise, &c., and before the bill became due, and before the commencement of this suit, to wit, on, &c., defendants paid plaintiffs a certain large sum of money, exceeding the said residue, &c., to wit, the sum of 415*l.* 12*s.* 6*d.*, in full satisfaction and discharge of the promises in the said declaration mentioned as far as respects the residue in the introductory part of this *plea mentioned, and also of all damages sustained by the plaintiffs by reason of the non-performance of such promise as far as respects such residue, and which said sum the plaintiffs then accepted and received of and from the defendants in full satisfaction of the said promise and damages, as far as respected such residue as aforesaid. Verification. [*269

Replication. That defendants did not pay plaintiffs, nor did plaintiffs accept or receive from them, the sum of money in the third plea mentioned, &c., in full satisfaction and discharge, &c., as far as respects the residue, &c., and also of all damages, &c., as far as respects such residue, in manner and form, &c. Conclusion to the country. Issue thereon.

The cause was tried before COLERIDGE, J., at the Durham Spring assizes, 1846, and a verdict found for the defendants on the issues upon the 2d and 3d pleas. *Knowles*, in the ensuing term, obtained a rule to

show cause why the verdict should not be set aside and a verdict entered for the plaintiffs with 3*l.* 15*s.* damages; or why the verdict on the third plea should not be set aside, and a verdict entered for the plaintiffs on that plea; or why judgment should not be given for the plaintiffs non obstante veredicto on the second plea; or why judgment should not be given for the plaintiffs non obstante veredicto on the second and third pleas. In this vacation,(*a*)

Archbold showed cause, and *Manisty* supported the rule.

Cur. adv. vult.

*270] *The material facts of the case and the points made in argument will appear sufficiently from the judgment of the Court, which was now delivered by

Lord DENMAN, C. J. After stating the result of the trial, and the terms of the rule, his Lordship said: As the objections urged are on technical points and after verdict for the defendants on the merits, it will be convenient in the first place to see what is proved, and what will be the state of the cause, supposing the plaintiffs' objections, or any of them, are available.

The action is in assumpsit on a bill of exchange for 419*l.* 2*s.*, and the damages are laid at 500*l.* The defendants, first, as to 4*l.* 18*s.*, parcel of the sum in the declaration mentioned, plead, to the further maintenance of the action, payment of 5*l.* into Court: secondly, as to the residue of the sum mentioned in the declaration, that the plaintiffs were agents and brokers for one Humble, and, as such, had sold property for him for 415*l.* 12*s.* 6*d.*, which was to be paid at a date to arrive before the maturity of the bill in the declaration; that Humble had applied to the plaintiffs to advance him this money, which the plaintiffs had agreed to do if he would procure the defendant's acceptance of the bill, they undertaking to appropriate the purchase money, when received, in satisfaction of the bill. The plea then showed an agreement made to this effect, and the acceptance given in consequence: it alleged that the purchase money was received before the bill became due, and was sufficient to satisfy the residue of the bill. Thirdly, the defendants pleaded, to the said residue, payment of 415*l.* 12*s.* 6*d.*, before the bill became due and before the commencement of the action, in discharge of the

*271] *promises and all damages as to the said residue. The second and third pleas have been found for the defendants.

The facts were, that the plaintiffs were sharebrokers, and had sold shares(*b*) for Humble for 415*l.* 12*s.* 6*d.* Before the settling day he wanted this money, and applied for it. The plaintiffs agreed to advance it, if he would procure the defendants' acceptance for the amount, promising to appropriate the purchase money, when received, to its dis-

(*a*) February 13th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

(*b*) In a projected railway company. The plaintiffs had bought these and other shares for Humble in September and October 1845. The bill was drawn in the latter month.

charge. The bill was drawn for a period beyond the settling day, and for 419*l.* 2*s.* to cover the accruing interest. To this arrangement the defendants consented, and accepted the bill on the faith of it. The purchase money was received in due time.

These facts were applied by the defendants in proof of the third as well as the second plea: but it was contended on the argument that they furnished no evidence of a payment by *the defendants*, as alleged in the third plea. We are, however, clearly of opinion with the defendants on this point. The acceptance was for the accommodation of Humble, as between him and them, and they were legally liable on it in the first instance to the plaintiffs: but it was perfectly open for the three parties to agree that Humble's money, when received by the plaintiffs, and which, when so received, would, apart from any agreement, have been received to his use, should be specifically beforehand applied to the discharge pro tanto of their liability on the bill: and it seems to be the good sense of the transaction to treat it as so much money paid to the plaintiffs by *Humble on their account and as their agent. By so treating it, this transaction, as between the plaintiffs and defendants, was disembarrassed of all questions upon the state of accounts between the plaintiffs and Humble, which the defendants were clearly entitled to insist on, or the indemnity on which they were taught to rely might become merely illusory. [*272

This view of the transaction also relieves the case from any difficulty as to entering a verdict for the plaintiffs for 3*l.* 15*s.* It appeared that the plaintiffs had a claim on Humble for brokerage, not on the sale of these shares, but on their previous purchase for him. In that purchase they had exceeded his limit, and had agreed not to charge brokerage, unless they sold at a profit which would cover it; and they had done so: clearly, therefore, as between them and Humble, there was a claim for the amount:(*a*) but, if they had agreed with the defendants that the proceeds, which were at the time of the agreement an ascertained sum, and for which, plus the interest, the acceptance was given, should be applied in discharge of the acceptance, they could have no more right, as against the defendants, to deduct for this brokerage than for any other sum which Humble might be owing them at the time.

We have then, on this record, the plaintiffs suing on a bill for 419*l.* 2*s.*, and we have, on the first and third pleas, payments established of 420*l.* 12*s.* 6*d.* But the plaintiffs then object that the second plea is bad, and that, upon the whole record, a part of their demand is left uncovered. The payment into Court under the *first plea is as to 4*l.* 18*s.*, parcel of the sum mentioned in the declaration: the second plea is pleaded "as to the residue" of that sum. The plaintiffs contend that [*273

(*a*) It was, consequently, argued, for the plaintiffs, that the purchase money received by them did not completely satisfy the bill, because they were entitled in the first instance to deduct the 3*l.* 15*s.* for brokerage.

if by "the sum in the declaration mentioned" be meant the amount of the bill, 419*l.* 2*s.*, then there is no plea to the demand for damages, which the plaintiffs are admitted to have, because the *whole* bill was not paid when due, nor before action brought. If, on the other hand, by "the sum in the declaration mentioned" be meant the 500*l.* damages, then the plaintiffs contend that the second plea will in its commencement profess to answer the whole, but will fail to do so in effect, because it pleads a payment of 415*l.* 12*s.* 6*d.* in satisfaction of a demand for 500*l.* minus the 5*l.* paid into Court.(*a*) We think, however, that the sum mentioned in the count is plainly 419*l.* 2*s.* The 500*l.* mentioned as damages is not claimed as a definite sum, but only to cover what the jury may give as damages, the action sounding in damages. The second plea, therefore, may fairly be considered to mean the residue of what the plaintiffs are entitled to sue for, that is the residue of 419*l.* 2*s.* (after deducting 4*l.* 18*s.*), and damages not exceeding 500*l.* in all. Now the residue of the bill, after deducting the 4*l.* 18*s.* paid into Court, is 414*l.* 4*s.*; and the second and third pleas show payment or receipt by the plaintiffs of 415*l.* 12*s.* 6*d.*, being 1*l.* 8*s.* 6*d.* *more than the residue of the bill: and both pleas state that sum to have been paid and received in respect of the residue and of all damages by reason of the non-performance of the promise. The damages, therefore, are pleaded to both by the second and third pleas, and are answered: and, though there is some confusion, and perhaps irregularity, in the mode in which this is done, yet upon the whole we think that, substantially, the whole declaration is answered. The defendants cannot be in a better situation than if they had demurred *generally;* and we think that those pleas would be good on general demurrer, whatever might be said on special demurrer. Rule discharged.

*274]

(*a*) *Manisty*, for the plaintiffs, after arguing as is stated in the text, contended that the defendants ought to have pleaded, first, as to the 415*l.* 12*s.* 6*d.*, part of the 419*l.* 2*s.* mentioned in the declaration, the special matter set forth in the second plea; and then, as to the residue of the cause of action in the declaration mentioned, payment into Court of 5*l.* He cited *Armfield* v. *Burgin*, 6 M. & W. 281. *Archbold*, contrà, referred to *Beaumont* v. *Greathead*, 2 Com. B. 494.

ROBINSON and Another *v.* MAINWARING. *Feb.* 25.

A cause commenced in the sheriff's court of the county palatine of Durham cannot be removed at once by pone into this Court, but must first be removed into the Durham Court of Pleas. The Court of Queen's Bench will quash a writ of pone issued in contravention of this rule.

THIS was an action of debt for 39*l.*, commenced by justices directed to the sheriff of the county palatine of Durham. The defendant, having been summoned to appear and answer at the then next county court on November 18th, 1846, removed the cause by writ of pone out of Chancery from the county court to this Court. The writ of justices was as follows.

"Victoria, by the grace," &c., "to the sheriff of Durham, greeting. We command you that, according to justice, you cause John Mainwaring that justly and without delay he render to John Robinson and Richard Thomas Hall the sum of 39*l.* of lawful," &c., "which he owes to and unjustly detains from them, as it is said," *&c. "Witness ourself at Durham, the 20th day of October, in the 10th year of our reign. [*275

"SCRUTON."

The writ of pone was as follows.

"Victoria," &c., "to the sheriff of Durham, greeting. Lay before Us, on the 25th day of November instant, wheresoever We shall then be in England, the plaint which is in your county by Our writ between John Robinson and Richard Thomas Hall and John Mainwaring, in an action of debt: and give notice to the said J. R. and R. T. H. that they be there ready to prosecute their plaint against the said J. M., if they be willing: and have you there this writ and the other writ. Witness Ourself at Westminster, the 14th day of November, in the 10th year," &c. "Because the said J. Mainwaring, for the farm which the said J. Robinson and R. T. Hall hath in the said Court, cannot obtain justice there, as it is said.(*a*) Let this writ be executed if the cause be true, and the said J. Mainwaring desire it; otherwise not. "BENTHALL."

The sheriff returned the proceedings into this Court, with the writs. The plaintiff took out a summons to show cause at chambers why the writ of pone should not be set aside, and a procedendo issued: and, in last Michaelmas vacation, ERLE, J., on hearing the parties, made an order, setting the pone aside, and giving liberty to the plaintiffs, on the fifth day of the ensuing term, to issue a procedendo to the county court.

S. Temple, in last term, obtained a rule to show cause why the order of ERLE, J., should not be rescinded.

**Hindmarch*, in the same term,(*b*) showed cause. An original writ cannot be issued into the county palatine from the Chancery at Westminster. No instance of such a proceeding can be shown. There is no cursitor for the county palatine. That the King's writ does not run in Durham appears from 6 Vin. Abr. 579, tit. *Court* [*of County palatine*], (S. 4) pl. 6, where 2 Bro. Abr. 50 a, tit. *Jurisdiction*, pl. 25, is cited.(*c*) A writ out of the Chancery at Westminster, directed to the sheriff, cannot be regular. The proper course would be, to remove the cause first from the sheriff's court into the Durham Court of Pleas, which is a superior court, and then to remove it into the Queen's Bench. For that purpose the writ out of Chancery would formerly have been directed to the Bishop or his Chancellor: now that the jurisdiction is transferred from the Bishop to the Crown (stat. 6 & 7 W. 4, c. 19, s. 1), the writ would be directed to the Chancellor only, as the Queen cannot issue a command to herself. *Edwards* v. *Bowen*, 5 B. & C. 206, shows [*276

(*a*) See Fitz. Nat. Brev. 119 K, 70 A.

(*b*) January 29th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

(*c*) See 4 Inst. 218, 219.

that a removal of proceedings from an inferior court is irregular, and will be set aside, if the proper steps have not been observed. The object of the defendant here has been to avoid giving the recognisances which, by stat. 2 & 3 Vict. c. 16, s. 33, a party is bound to provide on removing any cause (except an action of replevin), by pone or other writ, from an inferior court in the county palatine of Durham to the Court of Pleas here.

S. Temple, contra. This Court has no power to quash an original *277] writ issued out of Chancery. The *application should be to the Court of Chancery. [WIGHTMAN, J. The writ is returnable here, and is in fact before us. If we see on the face of the writ that it is bad, must not we quash it(*a*) and award a procedendo? Lord DENMAN, C. J. We quash writs de contumace capiendo.] As to the substance of the motion: since the act 27 H. 8, c. 24,(*b*) the Crown had, to a certain extent, concurrent jurisdiction with the Chancellor of the county palatine, and might issue a writ into the county at once. Such a writ, even if irregular, would not be void. The objection here taken, if allowed in its full extent, would affect the justices as well as the pone. But in *Jackson* v. *Hunter*, 6 T. R. 71, it was held, in an action on a bail-bond by the assignee of the sheriff of Durham, that the writ (a testatum special capias) on which the arrest had been made was not to be deemed void because it appeared by the record to have issued directly from this Court, without the intervention of the bishop. [COLERIDGE, J. It was said there that the course taken did not prejudice the defendant in the original suit. Here the plaintiff loses the benefit of the recognisances.] The ground alluded to is not taken in the judgment of ASHHURST, J. The decision in *Edwards* v. *Bowen* is, substantially, that certiorari is not the proper mode of removing a suit from an inferior court, not of record. It is true that, if the present cause had been removed through the Court of Pleas, recognisances must have been given, according to stat. 2 & 3 Vict. c. 16, s. 33: but there is no authority for saying that an action commenced in *278] the sheriff's court can be removed only *through the Court of Pleas. Sect. 33 was meant to be a restriction on parties removing such causes as are usually commenced in the inferior courts: but the legislature did not intend that persons bringing actions for large sums should avail themselves of the writ of justices to sue in the sheriff's court, and thereby obtain the benefit of recognisances if the cause were removed.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was a rule to set aside a procedendo sending back a cause which had been removed by pone into this Court from the sheriff's court at Durham.

(*a*) *Pashley*, amicus curiæ, mentioned *King* v. *Simmonds*, 7 Q. B. 289.
(*b*) Sect. 3 was referred to.

It appeared that the suit had been originally commenced by justices in the county court of Durham, and that the defendant had caused a writ of pone to be issued out of the Court of Chancery at Westminster, removing the cause from the sheriff's court at Durham into this Court. This, it was contended for the plaintiffs, was irregular; and a procedendo was issued by the authority of a Judge at chambers; and the question was whether the cause had been properly removed or not.

No authority was cited to show that, previous to stat. 2 & 3 Vict. c. 16, a cause could be removed directly from the sheriff's court at Durham into one of the superior courts at Westminster. The sheriff was, until lately, the officer of the bishop, and appointed by him and not by the crown; and his court was one of the inferior courts within the county palatine, the proceedings in which were removable into the superior court of the county palatine by *process from the Chancery there. In the county palatine of Lancaster, the proceedings of [*279 the inferior courts within it were always removable into the Court of Common Pleas there by process from the Chancery of the county palatine; and the practice always was so to remove them, and not into the superior courts at Westminster; as appears by the treatise on The Practice of the Court of Common Pleas at Lancaster by the late Sir David Evans.(a) If there were any doubts upon the point, the provisions in the 33d section of stat. 2 & 3 Vict. c. 16, would tend strongly to remove them. By that section, recognisances are required to be given by any person removing a cause from an inferior court in the county palatine into the Common Pleas there. Such a provision would be entirely nugatory if the proceedings could be removed from the sheriff's or other inferior court *per saltum* into the superior courts at Westminster. In the absence of any authority to warrant such a course, we are of opinion that this rule to set aside the procedendo must be discharged.

Rule discharged.

(a) P. 121, London, 1813.

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*SHARPE *v.* BLUCK, Clerk. *Feb.* 25. [*280

To avowry by a rector for cattle taken as a distress for arrears of a rentcharge in lieu of tithe on land of which the plaintiff was tenant, plaintiff pleaded in bar, that the bishop of the diocese had, under stat. 1 & 2 Vict. c. 106 (s. 75), appointed a curate to perform the duties of the rectory at a stipend: that defendant was, at that time, absent from the rectory, and had not resided thereon for nine months in the year next preceding, *to wit*, *the year commencing on the 20th March*, 1842, but had, for a period exceeding three months, to wit, &c., *in the course of the year aforesaid*, absented himself, &c.: that the curate complained to the bishop of non-payment of the stipend, whereupon the bishop summoned defendant, and, on his non-appearance, determined summarily, and adjudged 75*l.* to be due: that, defendant not paying, the bishop issued a monition, requiring him to pay, in default of which a sequestration would issue: that defendant was served with the monition, but did not pay: and the bishop thereupon issued a sequestration, under the seal of his consistorial court, empowering a sequestrator, whom the bishop appointed, to levy the 75*l.* on the profits, rentcharges,

&c., of the rectory; and that the sum now distrained for was demanded of plaintiff by the sequestrator, and paid by plaintiff to prevent his distraining. On demurrer to the plea,

Held, that the above proceedings to sequestration, under stat. 1 & 2 Vict. c. 106, s. 83, were not authorised by the statute, because the power to appoint a stipendiary curate is given, by sect. 75, only when an incumbent, under the circumstances there described, is absent *for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year:* and, by sect. 120, the year is to be reckoned *from 1st January to 31st December.*

And, therefore, that, for want of jurisdiction in the bishop to sequester, the payment under such sequestration did not discharge the plaintiff.

REPLEVIN for sheep taken in a close in the parish of Walsoken, Norfolk.

Avowry, stating that the said close, at the said time, when, &c., was liable to the payment of a certain yearly amount of rentcharge, to wit, 54*l.* 6*s.*, under the provisions of the statutes for the commutation of tithes in England and Wales: that one half yearly payment thereof, at the time when, &c., was in arrear, and unpaid for 21 days next after a half yearly day of payment, to wit, &c., and after notice, &c., left at the residence of plaintiff, then being tenant in possession of the close in which, &c.: and that a certain amount of the said rentcharge, according to the prices of corn, &c., to wit, 28*l.* 4*s.* 2*d.*, was, at the time of the said distress, due to defendant, he the defendant then being the person entitled thereto and to the said rentcharge. Wherefore defendant avowed

*281] the taking, &c., in the place in which, &c., as a distress for *the said arrears, according to the form of the statute in such case, &c. Verification.

Plea in bar. That heretofore, and before the making of the distress, &c., and before the appointment and licensing of the curate hereinafter mentioned, and after the passing of an act, &c. (1 & 2 Vict. c. 106), intituled "An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," to wit, on 29th March, A. D. 1843, the said parish of Walsoken was, and thence hitherto hath been and still is, situate within the diocese of Norwich, and within and subject to the ecclesiastical jurisdiction of the bishop of the said diocese; and defendant, during all the time aforesaid, hath been, and still is, a clerk in orders, and the rector and incumbent of the rectory of the parish and parish church of W. aforesaid (the said rectory being a benefice with cure of souls), and, as such rector and incumbent as aforesaid, entitled to the said rentcharge in the said avowry mentioned, the said rentcharge being a rentcharge payable in lieu of tithes. That heretofore, and before the making of the distress, &c., and after the passing of the aforesaid act of parliament, to wit, on the day and year aforesaid, Edward, then and now bishop of Norwich, did (in pursuance of the said statute and in conformity with its provisions), by a license in writing under his hand and seal, and bearing date the day and year aforesaid, duly appoint and license Michael John Mayers, then being a clerk in orders, to perform the office of stipendiary curate in the parish church of W. aforesaid, in reading the Common Prayer and per-

forming other ecclesiastical duties belonging to the said office of curate, the said M. J. M. having first subscribed and sworn to all things in that *case, &c.; and did, in and by the said license, require the said M. J. Mayers to reside in the said parish of W.; and the said bishop did, to wit, on the day and year aforesaid, in pursuance of the said statute and in conformity with its provisions, duly appoint to the said M. J. M. the yearly stipend of 150*l.*, and did in and by the said license specify the amount of the said stipend. "That, at the time of the said appointment and licensing of the said M. J. M. as aforesaid, to wit, on the day and year aforesaid, the defendant was absent from his said rectory and benefice aforesaid, and *had not resided on his said rectory and benefice for nine months in the year next preceding the said appointment* and licensing of the said M. J. M. as aforesaid, *to wit, the year commencing on the 20th day of March*, A. D. 1842, *but had, for a period exceeding three months, to wit, four months, in the course of the year aforesaid, absented himself* from his said benefice, not being, during the time aforesaid, resident on another benefice of which he was also the incumbent," nor, &c. (negativing the several exemptions in stat. 1 & 2 Vict. c. 106, s. 75), "and not having, when he the defendant so absented himself," &c., "as aforesaid, left any curate or curates duly licensed or approved by the said bishop to perform the ecclesiastical duties of the said rectory and benefice." [*282

The plea in bar then stated that, after the appointment and licensing, and before the making of the distress, and after the passing of the said act, to wit, on, &c., differences arose between defendant and the curate touching the payment of the stipend and the arrears thereof; and the curate complained to the bishop of the non-payment by defendant of 75*l.* due in respect of the stipend; that the bishop summoned defendant to *answer; and he was served with the summons, but did not appear; and thereupon the bishop summarily determined the complaint, and adjudged the 75*l.* to be due from defendant, as rector, &c., to the curate; that defendant neglected and refused to pay; and thereupon the bishop issued his monition to defendant to pay M. J. M. the 75*l.* on or before, &c., in default whereof a sequestration would issue; that the monition was served and returned with a certificate of service indorsed thereon, and verified by affidavit (the certificate and affidavit were set forth verbatim, but not the monition): that defendant did not pay, or show cause, &c.: That afterwards, and before the making of the distress, and before the said rentcharge became due, the bishop issued a sequestration (not set out verbatim) bearing date, &c., and sealed with the seal of the bishop's Consistorial court, directed to John Kitson, of, &c., by which the bishop sequestered all the fruits, rentcharges in lieu of tithes, profits, &c., of and belonging to the rectory and parish church of W. aforesaid and to defendant as rector thereof, and appointed Kitson sequestrator, giving him authority to publish the [*283

sequestration, and by virtue thereof to levy, &c., all the said fruits, rentcharges, &c., profits, &c., and by and out thereof to satisfy the said debt of 75*l.*, due for the serving of the cure, &c., as aforesaid, and also all costs and charges attending the recovery thereof: that the sequestration was personally served on defendant, and was returned into the registry of the bishop's Consistorial Court: and that afterwards, and before the making of the distress, &c., and after the rentcharge became due, to wit, on, &c., Kitson required plaintiff to pay the rentcharge; and thereupon plaintiff, to prevent the cattle then being in the said *284] *close in which, &c., from being distrained, paid the rentcharge so due and in arrear and unpaid as in the avowry mentioned, to Kitson as sequestrator. Verification.

Demurrer, assigning many causes, and, among them, that it does not appear in or by the said plea in bar that the said bishop had any power, authority or jurisdiction to issue the said sequestration. Joinder

The demurrer was argued in last term.(*a*)

Sir *F. Thesiger*, for the defendant. If there appear, in the proceedings as stated on the record, such an irregularity that the bishop could have no jurisdiction to sequester, the rector may claim the profits of the benefice, notwithstanding the sequestration; *Capel* v. *Child*, 2 Cro. & J. 558; S. C. 2 Tyr. 689. The present question turns on stat. 1 & 2 Vict. c. 106. By sect. 75 of that act, "If any spiritual person holding any benefice, who shall not actually reside thereon nine months in each year" (unless exempted as in that clause is mentioned), "shall for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year absent himself from his benefice, without leaving a curate or curates duly licensed or approved by the bishop to perform" the ecclesiastical duties of the benefice, or shall be guilty of certain other omissions, "in every such case the bishop is hereby authorised to appoint and license a proper curate, with such salary as is by this act allowed and directed, to *285] *serve the church or chapel of the benefice in respect of which such neglect or default shall have occurred." Sect. 83 enacts that it shall be lawful for the bishop, and he is thereby required, subject to the provisions and restrictions of the act, to appoint a stipend, as therein specified, to every curate of a non-resident incumbent; and that, "in case any difference shall arise between the incumbent of any benefice and his curate touching such stipend, or the payment thereof or of the arrears thereof, the bishop, on complaint to him made, may and shall summarily hear and determine the same, without appeal; and in case of wilful neglect or refusal to pay such stipend, or the arrears thereof, he is hereby empowered to enforce payment of such stipend, or the arrears thereof, by monition, and by sequestration of the profits of such benefice."

(*a*) January 22d and 26th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

Sect. 120 enacts: "That for all the purposes of this act, except as herein otherwise provided, the year shall be deemed to commence on the 1st day of January, and be reckoned therefrom to the 31st day of December, both inclusive." The first objection to the plea in bar is, that the defendant is not shown to have absented himself for more than three months "in the course of any one year," the year, according to sect. 120, commencing on January 1st and ending on December 31st. The year mentioned in the plea commences on 20th March, 1842: part of the absence, not exceeding three months, may have been in 1842, and a like part in 1843. Therefore it does not appear that the bishop had jurisdiction to summon and sequester. (He then stated other objections to the averments of fact in the plea, and to the form of the proceedings as far as they were set forth *on the record; but the judgment of the Court renders a further report on these points unnecessary.) [*286

Couch, contrà. Sect. 120 follows several clauses relating to the infliction of penalties, and must be read as applying to that subject. For the purpose of apportioning forfeitures under sect. 32,(a) and of determining whether a party should be punished as non-resident for times exceeding three, six or eight months, it might be reasonable to apply the limitation given by sect. 120; but, when the question is what length of time shall elapse before the bishop shall provide for the service of a cure deserted by the incumbent, there can be no reason for inquiring whether the absence has been confined to one year or extended into two. The necessity of causing the church to be served cannot be so measured. [COLERIDGE, J. Then why, in sect. 75, are the words "in the course of any one year" introduced?] The words are "for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year." "In the course," *&c., may apply only to the case, mentioned immediately before, where the months are "accounted at several times:" and then an absence for three consecutive months will come within the enactment, though the months be December, 1842, and January and February, 1843. [COLERIDGE, J. "In the course of any one year" seems to over-ride all that follows the words "for a period."] Perhaps the words as to date, in the plea, "to wit, the year commencing on the 20th day of March, A. D. 1842," may be rejected. (He then argued on the other objections.) [*287

(a) Stat. 1 & 2 Vict. c. 106, s. 32, enacts: "That every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if any such person shall, without any such license or exemption as is in this act allowed for that purpose, or unless he shall be resident at some other benefice of which he may be possessed, absent himself from such benefice, or from such house of residence, if any, for any period exceeding the space of three months together, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months and not exceed six months, forfeit one third part of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six months and not exceed eight months, one half part," &c.; "and when such absence shall exceed eight months, two third parts," &c.; "and when such absence shall have been for the whole of the year, three fourth parts of such annual value."

But, if the proceedings to sequestration are defective on any of these grounds, the defendant should have tried the question by an action against the sequestrator, as was done in *Capel* v. *Child*, 2 Cro. & J. 558; S. C. 2 Tyr. 689. The objections are not available against a stranger, who, as the tenant of lands subject to the rentcharge, has paid it in obedience to process from the Consistorial court. Cases which have been mentioned on the other side,(*a*) as showing that a statutory jurisdiction must be executed with strict regularity, and should appear by the proceedings themselves to have been so executed, might apply where the bishop, as an individual, exercised such jurisdiction: but the issuing of a sequestration, under sect. 112 of stat. 1 & 2 Vict. c. 106, is the act, not of the bishop, but of his Court; that clause directing that, when a spiritual person is served with a monition under the act, which monition
*288] is to issue under the bishop's hand *and seal, the monition shall "be returned into the Consistorial court of such bishop, and be there filed," and the party monished may thereupon show cause why a sequestration should not issue; "and if such spiritual person shall not, within the time assigned by such monition, show sufficient cause to the contrary, such sequestration shall issue under the seal of the Consistorial court of such bishop, and shall be served and returned into the registry of such court in like manner as is hereinbefore directed with respect to monitions" under this act. The sequestration therefore (under which the official principal makes his warrant) is like a fi. fa. out of this Court. If, under stat. 1 & 2 Vict. c. 110, s. 12, an execution creditor were to proceed in the name of the sheriff on a bill of exchange seized under the fi. fa., and thereby obtain payment from the debtor of the party owning such bill, the debtor, if again sued on the bill, might allege that payment without being obliged to prove that all the proceedings to execution were regular. [COLERIDGE, J. Do you say that, in a case like the present, there would be a complete defence even if no monition had issued?] There would, for a stranger, who is obliged to obey the writ. The principle on which sheriffs executing process are justified applies here. [WIGHTMAN, J. A sheriff is obliged to execute process: is a sequestrator obliged to act in that character?] This is not the ordinary case of a private person taking out sequestration to recover a debt. [PATTESON, J. According to you it would be sufficient, in such a case as this, to plead nothing more than payment under a sequestration.] The argument goes that length. The tenant of the land subject to the rentcharge cannot dispute the writ, or oblige the sequestrator to show
*289] the validity of the proceedings. The sequestrator is merely *the bailiff or agent of the bishop; *Jones* v. *Barrett*, Bunb. 192;(*b*)

(*a*) *Newman* v. *Earl of Hardwicke*, 8 A. & E. 124; *Regina* v. *Martin*, 2 Q. B. 1037, note (*b*); *Christie* v. *Unwin*, 11 A. & E. 373; *Brancker* v. *Molyneux*, 4 Man. & G. 226; and *Re Dent Commutation*, 8 Q. B. 43; had been cited as to the effect of objections taken to the form of the sequestration.

(*b*) See *Berwick* v. *Swanton*, ib., note.

Harding v. *Hall*, 10 M. & W. 42: and, if an action were brought against him, it would be enough for him to show the writ only; *Andrews* v. *Marris*, 1 Q. B. 3, 17. The principle now relied upon is that which was laid down in *Allen* v. *Dundas*, 3 T. R. 125 (and with which *Digby* v. *Wray*,(*a*) and the dictum of the Court in *Philips* v. *Biron*, 1 Stra. 509, and of BEST, J., in *Woolley* v. *Clark*, 5 B. & Ald. 744, 746, agree), on the subject of payment to an executor or administrator acting under probate or letters of administration which are afterwards annulled: "That every person is bound by the judicial acts of a court having competent authority: and during the existence of such judicial act, the law will protect every person obeying it." The operation of the same principle, in favour of a stranger, is exemplified in 3 Bac. Abr. 420, tit. *Execution* (Q). *Hasser* v. *Wallis*, 1 Salk. 28, is also a strong instance of the validity ascribed to payments received by a de facto claimant.

Bramwell (Sir *F. Thesiger* being absent), in reply. If the defects of authority, shown by the averments in the plea and the documents as there referred to, are immaterial as between the plaintiff and defendant, it would be enough to plead, without reference to any previous dispute or proceedings, that a sequestration had issued. The power to issue sequestration in cases of this kind is given by statute, and must be asserted with the same precision which is required in other cases of statutory jurisdiction. Many authorities show that *an order, made in [*290 the exercise of such jurisdiction, cannot be upheld by merely supposing the facts necessary to give it. In the case of a sheriff executing a fi. fa., intendment is made in favour of the common law authority of a superior court, having a general jurisdiction: but actions are brought against assignees to try the validity of a commission of bankruptcy. And, generally, where acts are to be justified under an inferior or merely statutory jurisdiction, the authority must expressly appear; *Harrison* v. *Wright*, 13 M. & W. 816, 818: and, if, in such a case, it be clear that there was no legal jurisdiction, even an officer is not protected; *The Case of The Marshalsea*, 10 Rep. 68 *b*, 76 *b*; for "it is not of necessity to obey him who is not judge of the cause." *Shergold* v. *Holloway*, 2 Stra. 1002; *Regina* v. *Burnaby*, 2 Ld. Raym. 900; *Brown* v. *Compton*, 8 T. R. 424; *Morse* v. *James*, Willes, 122; *Morrell* v. *Martin*, 3 Man. & G. 581; and *Watson* v. *Bodell*, 14 M. & W. 57, are among the authorities on this point. [PATTESON, J., mentioned *Thomas* v. *Hudson*, 14 M. & W. 353.] (*b*) As to the illustration drawn from payments made to persons acting as executors, it is not universally true that such payments are valid: 1 Wms. Executors, 488, et. seq., Part 1, B. 6, c. 3, Ed. 4. The alleged hardship on a stranger compelled to pay arrears which he has already paid under threat of distress to another party is only that which unavoidably takes place in many

(*a*) 3 Bac. Abr. 476, tit. *Executors and Administrators* (E) 13, 7th ed.
(*b*) Affirmed on error, *Thomas* v. *Hudson*, 16 M. & W. 885.

cases, and which the Interpleader Act was passed to remedy. The real creditor also would suffer hardship if his debt could thus be transferred
*291] to another: and he is entitled *to suppose that the debtor might have resisted the unjust claim, or may now recover what he has paid under it. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

A great many points were raised for our consideration in this case: but we find it necessary to decide in favour of the defendant upon one; because we find that the plea in bar does not give the bishop jurisdiction to appoint a curate, and to assign him a salary on the non-residence of the rector. The statement is, that the defendant, the rector, was absent from his rectory and benefice, and "had not resided on his said rectory and benefice for nine months in the year next preceding the said appointment, and licensing of" the curate "as aforesaid, to wit, the year commencing on the 20th day of March, A. D., 1842; but had, for a period exceeding three months, to wit, four months, in the course of the year aforesaid, absented himself from his said benefice," not being at the time residing on another benefice of which he was the incumbent.

We think this is not shown to be such a non-residence as authorises the bishop to appoint a curate; because it is consistent with this plea that the rector may have absented himself for a time which would go towards the making up of four months at the end of the year ending 31st December, 1842, and a time which would go towards the making up of four months in the year 1843: and the year is made to commence, by the 120th section of stat. 1 & 2 Vict. c. 106, on the 1st of January,
*292] for all the purposes of the act not specifically excepted in that *enactment. The year, during which the non-residence is here supposed to have given the right to appoint a curate, is such a year as the act does not contemplate; not a year commencing on the 1st January, but a year commencing on the 20th March. The allegations are quite consistent with a full compliance with the statute by a residence within the meaning of sect. 120: and therefore the jurisdiction fails; and we are not called upon to inquire into the validity of the other objections. Judgment for defendant.(a)

(a) See *Howard* v. *Gosset*, p. 359, post, and *Gosset* v. *Howard*, p. 411, post.

TURNER v. BATES, BUSH and WOODS. *Feb.* 25.

It is not an invariable rule (if there be a rule) that the affidavit annexed to a claim of conusance shall not be answered by counter-affidavits.

And, where the University of Cambridge claimed conusance in the case of A., B. and C., alleged in the claim to have been summoned "in an action of trespass at the suit of D., against the form of the privilege" of that university, and the affidavit stated that B. and C. were common servants of the university, called proctors' men, and that the supposed trespass

was an act done by them in discharge of their duty, in obedience to the order of A., a pro proctor of the Universaity:

Held, that an affidavit might be received in answer, showing that B. and C. were constables appointed under stat. 6 G. 4, c. 97, and therefore, by sect. 1 of that act, liable to be sued at common law, notwithstanding any privilege of the University.

And that such affidavit, alleging that B. and C., at the time, &c., "were constables in and for the University, appointed and acting under and by virtue of" the above statute, "and that this action is brought against them for and in respect of acts done by them in execution of their said office," without further detail, were a sufficient answer to the claim, as to B., and C.

Quære, whether the claim could be well made without showing if the fact were so, that B. and C. were not such constables as the statute excludes from privilege.

Quære, whether claim of conusance can be allowed as to one party for whom it is made, when refused as to others, his co-defendants in trespass.

The University employed, in making the claim, T., an attorney, who had been appointed attorney and solicitor to the University by the Heads of Houses. M., another attorney, was in general partnership with T., but was not attorney or solicitor to the University, and had taken no part in making the claim of conusance: it did not appear whether or not he had any share in the profits of that proceeding. M. and T. had not, jointly or severally, been concerned in the cause of which conusance was claimed. *Held* no objection to affidavits in support of the claim, that they were sworn before M., who was a commissioner.

IN Michaelmas vacation, 1843, before PATTESON, J., at chambers, the Vice Chancellor of the University of Cambridge made claim of conusance in the above cause.

*The claim of conusance, directed to the Lord Chief Justice and the rest of the Justices of this Court, recited that, by letters [*293 patent of Queen Elizabeth in the third year of her reign, it was granted to the Chancellor, Masters and Scholars of the University, and their successors for ever, that the Chancellor, &c., and their successors for ever, and their deputies for the time being, "should have conusance before themselves of all and all manner of personal pleas, as well as of debts, accounts and all other contracts whatsoever and injuries, as of trespass against the peace, and of all misprisions, within the said town of Cambridge and its suburbs begun and made, or at any time thereafter to be begun or made (mayhem and felony only excepted), where and whensoever any Master or Scholar or Servitor or Common Minister of the said University should be one of the parties; and that all and singular such like pleas and trespasses aforesaid the Chancellor and Scholars, and their deputies and their successors, should hold and finally determine wheresoever within the town and suburbs of the same town as they should think fit, and execution thereof should make according to the laws and customs aforetime used: and that the said Court of the Chancellor, Masters and Scholars upon such pleas and the trespasses aforesaid should be a Court of Record, and that of such like actions, complaints, suits and trespasses, as well official as private, according to the aforesaid laws and customs(*a*) should inquire, know, hear and finally determine in the same manner and form as aforesaid they were accustomed; and as well by amerciaments, according to the sound(*a*) *discretion to be imposed, as by imprisonments of the bodies of [*294 delinquents and contumacious and guilty persons, to compel all and sin-

(*a*) Sic.

gular delinquents and defendants in any such like actions, complaints and trespasses to appear and answer in the same actions, complaints and trespasses, and, if any delinquent or defendant, or any delinquents or defendants, in any such like action, complaint or trespass should be convicted, to call upon all and singular such like delinquents, guilty persons and defendants to make satisfaction concerning all things of which they should have been convicted, or any one of them should have been convicted, according to the laws and customs of the said University aforetime in use, or according to the statutes of the kingdom of England then published or thereafter to be published: and that as well the justices assigned or to be assigned to hold pleas before the said late Queen," &c., "and the Justices of the bench," &c., "as all other judges whatsoever, in the presence and absence of the said Queen, her heirs and successors, to the said Chancellor, and his successors and the(*a*) deputies, should, without any difficulty or impediment, allow the conusance of all the aforesaid kinds of pleas; and that no justice or judge, in the presence or absence," &c., "or mayor, bailiff or other minister, should intermeddle concerning the said pleas or any of them, nor put the party to answer before them, but that that party before the said Chancellor and his successors, or the deputies there, only, should be acquitted or punished in form aforesaid, and not elsewhere or otherwise; and that all and singular writs in such like pleas and trespasses made or to be made contrary to the said Queen's grant should be by law *null."(*b*) The claim also recited stat. 13 Eliz. c. 29, confirming the above letters patent and all others granted to the University by the Queen's progenitors or predecessors. The claim then proceeded: "And whereas an action hath lately, as is alleged, been commenced in Her Majesty's Court of Queen's Bench at Westminster against the Rev. William Bates, Fellow of Christ College in the said University, and a Pro-proctor of the said University, together with William Bush and Charles Woods, both of the town of Cambridge, servants of the same University, at the suit of Henry Turner; and the said W. B., W. B. and C. W. have been severally served with a writ of summons issued out of the said Court, whereby," &c.; reciting the writ, which commanded them to enter an appearance in Q. B. "in an action of trespass at the suit of the said H. T.; against the form of the privilege aforesaid: We certify and signify to you that the said W. Bates, before and at the time of suing, summoning and impleading aforesaid, was a Pro-proctor of the said University, and a Fellow of Christ College aforesaid, and resident within the same, and registered in the book of matriculation of the said University, and still is a resident member of the University: Therefore we pray you that, by virtue of the privileges to us in this behalf granted,

*295]

(*a*) Sic.

(*b*) On the argument in Banc it was contended that the charter was in some respects inaccurately translated.

confirmed and enacted, as soon as you shall have inspected these our letters significatory and claim, you will be pleased to suspend all further process and execution thereof against the said W. Bates, W. Bush and C. Woods, and them from your Court freely to dismiss without any expense; and that you will be pleased to remit the *conusance and final decision of the said action, &c., to us, according to the [*296 form and effect of the privileges aforesaid; by virtue of which said privileges them the said W. Bates, W. Bush and C. Woods for persons privileged and of the jurisdiction of the University aforesaid, and the conusance and final determination of the action aforesaid, we challenge and claim by these presents. Dated under the seal of the office of Chancellor," &c., 9th December, 7 Vict. A. D. 1843. (Signed) "W. HODGSON, Vice Chancellor."

To the claim was annexed a certificate, under the hand and seal of the Vice Chancellor, "that William Bates was matriculated a pensioner of Christ College in this University of Cambridge on the 14th day of November, A. D. 1831." The registrar of the University made affidavit to the same effect, and verified the signature of the Vice Chancellor to the certificate, and the seal affixed to each document; and likewise his signature and seal to a power of attorney, entered on the rolls of the Court, whereby he, as Vice Chancellor, locum tenens and deputy of the Chancellor, Masters and Scholars, appointed George Joseph Twiss and Clement Tudway, and either of them, attorneys and attorney of the Chancellor, Masters and Scholars to claim and defend the liberties and privileges of the University in the said action.

Mr. Bates, and Bush and Woods, made affidavit respectively of having been served with copies of the writ of summons. Bates deposed that he was a resident member of the University, Master of Arts and Fellow, &c., and a Pro-proctor; that the supposed trespass was an act done by him, on 29th November then last, in discharge of his duty as Pro-proctor; that the courts of *the Chancellor of the University [*297 are regularly holden within the limits of the same, for the trial of all causes arising within its jurisdiction; that deponent, at the time of the issuing and service of the writ, and still, was liable to be sued by the plaintiff in that Court; and that the cause of action, if any, arose within the liberty of the said University, that is to say within the town and suburbs of Cambridge, and not elsewhere. Bush stated "that he now is, and for five years last past hath been, a common servant of the said University of Cambridge, called a Proctor's man, and that the supposed trespass for which this action is brought was an act done by him on the 29th day of November last in the discharge of his duty, in obedience to the order of the defendant William Bates, a Pro-proctor of the University." Woods's affidavit on this point was in all material respects the same. Bush and Woods both stated that they were liable and

willing to be called upon to answer the plaintiff in the Vice Chancellor's Court.

All these affidavits purported to be sworn before "J. E. Marshall, a commissioner, &c."

PATTESON, J., indorsed on the roll: "Claim made this 11th day of December, 1843; and let a summons issue to show cause why the conusance should not be allowed. J. PATTESON, December 11th, 1843."

The plaintiff made affidavit in answer (December 19th): That the defendants, on the 29th November, &c., entered his house, situate in Bridge Street in the borough of Cambridge, and then broke and damaged the doors of the said house; that the action was brought for those trespasses; and that plaintiff, at the time of the commission thereof, and of the commencement of this action, was, and continually thence hath been, and now is, a burgess of the borough of Cambridge, &c.: And that Bush

*298] and *Woods were, at the time of the commission of the trespasses, &c., and at the time of the commencement of this action, and thence continually have been, and now are, "constables in and for the University of Cambridge, appointed and acting under and by virtue of a certain act of parliament," &c.(a) (6 G. 4, c. 97); "and that this action is brought against them for and in respect of acts done by them, the said W. B. and C. W., in execution of their said office."

The plaintiff's attorney also made affidavit (December 19th), stating that the mayor, bailiffs and burgesses of Cambridge were a prescriptive corporation, and reciting charters of King John and Henry III., the latter granting to the burgesses of Cambridge, among other things, that they "might plead within the town all pleas touching their liberty, as well de vetito namio as other pleas, which they might plead without his" (the king's) "justices, so that neither any sheriff or other the king's bailiff might intromit in anything belonging to their liberties, unless by default of the said burgesses or their bailiffs." The affidavit also stated instances in which the mayor and bailiffs had claimed and been allowed conusance of personal actions brought in the King's Bench and (in 7 R. 2) in the Hall of the King's House at Cambridge before the steward and marshal of the King's House: and that there is an ancient prescriptive Court of record in the borough, called the Court of Pleas, now held weekly before the Recorder, having conusance of all actions, real, personal and mixed, arising in the borough, and which sits eight times a year for the trial of issues in law and fact.

*299] The plaintiff's attorney afterwards (December 22d) *made another affidavit, stating: that J. E. Marshall, the commissioner before whom were sworn the affidavits of the registrar and of the three defendants, was, when those affidavits were sworn, and now is, "the partner, in the profession of an attorney and solicitor, of G. J. Twiss, gentleman, who was, when the said affidavits were severally sworn as

(a) "For the better preservation of the peace and good order in the Universities of England."

aforesaid, and who now is, the attorney for the University of Cambridge and for the Vice Chancellor thereof, and is employed, as such attorney, in making claim of conusance of this cause" on behalf of the said University and Vice Chancellor: and that Twiss and Marshall "were, at the time when the said affidavits were severally sworn, and now are, the attorneys of the said defendants in the defence of this action."

After hearing on the summons, it was arranged, with the sanction of the learned Judge, that the motion should be made in full Court, that the defendants should be at liberty to put in an affidavit on the point affecting the jurat, and that cause should be shown, in the first instance, on all the affidavits.

Twiss accordingly deposed as follows. That he carried on the business of an attorney and solicitor in Cambridge, in copartnership with J. E. Marshall, under the firm of Twiss & Marshall. That deponent was the attorney and solicitor of the Chancellor, Masters and Scholars of the University of Cambridge, appointed by virtue of a resolution of the Heads of Houses of the University, on or about 20th November, 1838, and had so continued ever since. And that Marshall and deponent "are not jointly the attorneys or solicitors to the said Chancellor, Masters and Scholars; but he, this deponent, solely holds the said appointment." "That he, as such attorney," &c., "to the said University as aforesaid, and not jointly with the said J. E. Marshall, *was employed by [*300 the Vice Chancellor of the said University to make claim of conusance of the above named cause on behalf of the said Chancellor," &c., and did accordingly prepare the said claim, and certain affidavits to accompany the same, which were sworn before the said J. E. Marshall. That, on 9th December, 1843, when the said affidavits were sworn, "Deponent was not, nor had been, nor was nor had been the said firm of Twiss & Marshall, or the said J. E. Marshall, in any manner concerned in this cause for the said defendants," Bates, Bush and Woods, "or any of them, as attorneys or otherwise; and that the only instruction received by this deponent or his said partner in relation to the above named cause were and are the instructions given to him, this deponent, by the said Vice Chancellor, to do what was necessary for and on behalf of the said Chancellor, Masters and Scholars, in making and establishing the said claim, and no further." "And that neither he, this deponent, nor his said partner, nor the said firm of Twiss & Marshall, gave instructions to the agents in this cause, or any other person, to cause an appearance to be entered for the defendants therein."

In Hilary term, 1844,(*a*)

Sir *W. W. Follett*, Solicitor General, moved that the claim should be allowed: and he contended that the objection to the jurat was answered by Twiss's affidavit, which clearly showed that Marshall had no share in the profits arising from the conduct of the case. (He then proceeded to

(*a*) January 29th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

argue on the other points: but the Court desired that the preliminary point should be first disposed of.)

*301] *Kelly* and *Andrews* showed cause in the first instance. It is not distinctly sworn that Marshall is not interested in the profits: all that appears is that he was not appointed attorney for the University. If Marshall were called as a witness to the swearing, and an objection on the ground of interest could now be taken, he, if sharing the profits, would be interested, as much as Twiss. There is no rule of Court directly applicable: but the practice is fully understood. The Rule of the Court of King's Bench, E. T. 15 G. 2,(*a*) is as follows: "Whereas the swearing of affidavits before commissioners authorised to take affidavits in this Court, in causes wherein such commissioners are concerned as attorneys for the parties on whose behalf such affidavits are made, is and hath been disallowed as irregular, which, with respect to affidavits made of the cause of action before process sued out, in order to hold the defendants to bail, hath been found inconvenient, it is ordered, that from and after the last day of this term, all affidavits of any cause of action before process sued out to hold defendants to bail, may be sworn before any commissioner authorised to take affidavits in this Court; although such commissioner be concerned as attorney for the plaintiff; and shall be deemed to be regularly taken." That clearly recognises the general contrary practice. That this practice included the partner of the attorney on the record appears from *Batt* v. *Vaisey*, 1 Price, 116. Now, by R. Gen. Hil. 2 W. 4, I. 3, 6; 3 B. & Ad. 374,

*302] 375: "No affidavit of *the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk;" and, "Where an agent in town, or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail." This shows that the principle is not confined to the attorney on the record. [PATTESON, J. In *Doe. dem. Grant* v. *Roe*, 5 Dowl. P. C. 409, my brother COLERIDGE held that the last mentioned rule does not extend to the clerk of an attorney applying to have his client let in to defend in ejectment.] At that stage, the client was not a party to any cause. And it may be doubted whether, even so explained, the case does not go too far. When an affidavit was made to hold to bail, there was, properly speaking, no cause in existence: yet it appears that, but for the special rule which has been cited, such affidavit could not be sworn before the attorney for the plaintiff. [COLERIDGE, J. I think, according to the old practice, the Court of Common Pleas

(*a*) Peacock's Rules, K. B. 139. There is a rule in C. P., of E. T. 13 G. 2, which is to the same effect, and extends the allowance to affidavits "of the service of process where only a common appearance is required." Peacock's Rules, C. B. 150.

allowed affidavits to be sworn before the attorney in the country, not being the attorney on the record.(*a*) PATTESON, J. I do not see how the University is a party to this record at all.] The claim of conusance is analogous to a suit at law: it becomes a matter of record, and may be pleaded or demurred to.(*b*) The special power of attorney, it is true, is granted to one only: but that is so on other records; and the argument founded on this *fact, if good, would at once make the rule inapplicable in any case to the partner of the attorney on the record. [*303 The practical question is whether the commissioner be not interested in the profits to be derived from the proceeding by his partner, the attorney employed to prosecute the claim of conusance.

Sir *W. W. Follett*, Solicitor General, *Starkie*, *Cowling* and *Cleasby*, contrà. It may be doubted whether a claim of conusance be a proceeding to which the general rule is applicable at all. There are no costs to be recovered from the opposite side so as to give the attorney an interest in the event. [Lord DENMAN, C. J. The attorney for a party moving for a criminal information cannot take the affidavits: I think there is a case to that effect in Kenyon's Notes: (*c*) we have repeatedly acted on that principle. Proceedings for an information may produce profits: they are causes to this extent at least.] *Rex* v. *Wallace*, 3 T. R. 403, certainly is an authority in the case of an attachment. But here the attorney represents a party who comes only to insist that the right of trial is in himself. In *Williams* v. *Hockin*, 8 Taunt. 435, a motion was made to vacate a bond, warrant of attorney and judgment thereon, for securing an annuity, and that the sums levied in execution might be returned, on an affidavit sworn before a commissioner who, as appeared by affidavit on the other side, had stated that "he" was about to move to set aside the annuity, and who had been the legal adviser of the defendant. It appeared, however, that the commissioner was neither the *attorney nor London agent in the cause: and the Court of Common [*304 Pleas held that the rule applied only to the attorney in the cause, and received the affidavit objected to. [PATTESON, J. That may be one of the cases which gave rise to the rule of Hil. 2 W. 4, I. 6, 3 B. & Ad. 376: our practice differed from that of the Court of Common Pleas. COLERIDGE, J. It has been held in the Exchequer that the affidavit of service of declaration in ejectment may be sworn before the attorney in the cause.(*d*)] The affidavit here might have been sworn before Twiss himself. But, as it is, it is not even sworn before the attorney for the University, who has a special and individual appointment from the Heads of Houses. Even if Marshall partook of the profits, that would

(*a*) See *Read* v. *Cooper*, 5 Taun. 89.

(*b*) See *Leasingby* v. *Smith*, 2 Wils. 406, 409, 410. And p. 309, post.

(*c*) Probably *Rex* v. *Gaoler of Ipswich*, 2 Ken. Notes, 421. See *Regina* v. *Mixen*, 1 Dowl. P. C. N. S., 865.

(*d*) See *Doe dem. Cooper* v. *Roe*, 2 Y. & J. 284, before the rule of Hil. 2 W. 4, r. 3. It seems that the service of the declaration in ejectment was considered process.

not, as against the University, put him and them in the relation of attorney and client. Where a firm is employed, the partner of the attorney on the record may perhaps be within the rule: but here the commissioner is not the attorney for the University or the defendants in any sense. *Cur. adv. vult.*

Their Lordships delivered judgment on this point on the following day (January 30th).

Lord DENMAN, C. J. We have given this question a fuller consideration than we at first thought would have been required. Some doubt may perhaps be felt as to the reason of the general rule: but it has
*305] been acted on for ages in courts of common law. In *Smith* v. **Woodroffe*, 6 Price, 230, the Lord Chief Baron RICHARDS, sitting in equity, and finding that the practice there was to receive affidavits sworn before the attorneys of the parties, directed that this should not be done for the future, thus making a rule where none existed before: and a General Order (*a*) to that effect was afterwards made on the equity side of the Court. It would be very dangerous if we were now to act in contradiction to a rule established for so many years. We must, therefore, consider it to be in full operation. But here, by fair construction, I think that Marshall is not to be considered as the partner of Twiss. It is argued that a similar answer might be made wherever there are two attorneys in partnership, one of whom is the single attorney on the record: but certainly we should never give effect to the objection where the two could not be considered, in some way, partners as to the particular cause. The statement here is that Twiss was appointed attorney and solicitor of the University by appointment from the Heads of Houses, and that he holds the appointment solely, and not jointly with Marshall; and that he was employed, and not he and Marshall jointly, to make this claim of conusance; and, further, that neither he nor Marshall, as a firm or separately, had been concerned in the cause itself. Marshall therefore is clearly not within the rule.

PATTESON, J. I certainly did express, at chambers, an opinion that the affidavits ought not to be sworn before the partner of the attorney making the claim of conusance: but I thought it a proper question to be
*306] *considered by the whole Court. It is new to have these questions brought before a Judge at chambers; but, no doubt, that must occur in business which is to be transacted in vacation as well as term. The rule, as I thought, and still think, applies wherever there is the relation of client and attorney between the party on whose behalf the affidavits are made and the commissioner. In *Batt* v. *Vaisey*, 1 Price, 116, the rule was extended to the partner of the attorney; and why? Because the relation of attorney and client ordinarily exists between the firm of the attorneys and the client: that is the ordinary

(*a*) July 11, 2 G. 4; 9 Price, 478.

practice; and it is this which creates the partnership in the particular cause. The rule, therefore, ceases to be applicable where the commissioner, who is a partner, is shown not to be connected with the cause as attorney. That is so here. Twiss is appointed, solely, for the University, by the Heads of Houses, and solely makes this claim on their behalf. Marshall, therefore, does not stand to the University in the relation of attorney.

COLERIDGE, J. I am entirely of the same opinion. If a partnership were subsisting here, it might be necessary for us to settle a principle as to which different opinions might be entertained. But into that we need not go. I think that, if Marshall were the partner of the attorney for the University, there would be a good objection to these affidavits, although this is not strictly a cause between party and party; for otherwise the rule would be without effect. Then the question arises whether Marshall is a partner: if he be so, in *the sense in which members of a firm of attorneys are generally partners of the one who [*307 is attorney on a record, the rule must apply. But here it seems that the facts are otherwise. Twiss had nothing to do with the cause of *Turner* v. *Bates:* but he held an appointment from the Heads of Houses as attorney to the University, on behalf of which he makes this claim of conusance. Marshall, though partner in the general business, has nothing to do with the University's claim. There is no improbability in this: nothing is more common than a partnership which does not include some particular transaction. Are we then to look at the depositions on this point with any particular suspicion? I think not: the facts are sworn to most positively: and they do not raise the question.(*a*)

The argument on the question whether or not the claim of conusance should be allowed stood over till Trinity term, 1845, when

Kelly and *Andrews* showed cause.(*b*) The plaintiff's affidavit shows that Bush and Woods, at the time of committing the trespasses, were constables for the University, appointed under stat. 6 G. 4, c. 97, s. 1, and that they are sued for acts done in execution of that office. But, by a proviso in sect. 1, it is enacted, "that every such constable, for any act done by him in the execution of his office, shall be liable to be sued or indicted in the courts of common law, notwithstanding *such [*308 constable may be a member of the University, and notwithstanding any claim of cognisance or privilege whatsoever." The claim, therefore, cannot be supported as to Bush and Woods; and the circumstance that a party not a constable is joined with them cannot prevent the statute from operating in their case. (Several other objections were

(*a*) WIGHTMAN, J., was not in Court.

(*b*) June 10th. Before Lord DENMAN, C. J., PATTESON, WILLIAMS and COLERIDGE, Js. PATTESON and WILLIAMS, Js., expressed doubt whether they, being members of the University, ought to take part in the decision; but the plaintiff's counsel said that there was no objection on their side.

made; but the report is confined to the points noticed by the Court in giving judgment.)

Starkie, *Cowling*, and *Cleasby*, contrà.(*a*) The clause cited applies where there is an "act done" in the office of constable. The affidavits here do not show that, but only that Bush and Woods were constables, and that "this action is brought" against them "for and in respect of acts" done by them in the execution of that office. The nature of the acts ought to have been shown, or at least the belief of some deponent stated that certain acts which had taken place were done in execution of the office. (The Court desired to hear all the counsel for the University on this point, before proceeding to the others.) The deponents, in effect, swear to nothing more than their view of the statute as applying to the case. They do not explain how Bates and the other two parties are connected as defendants. It does not appear that Bates, as Pro-proctor, could give orders to them as constables. [COLERIDGE, J. The act does not give the Proctors or Pro-proctors authority to employ persons as constables. But, if we find a Pro-proctor employing these persons to break into a house, must not we conclude that they were acting as *constables ?] The Court cannot judicially come to such a conclusion. But, further, the plaintiff is not entitled to be heard on affidavit. The claim of conusance is supported by an affidavit, but that is done, as in the case of a plea in abatement, to inform the Court. The opposite party cannot put in affidavits: if the claim is unfounded in law or in fact, he must plead, accordingly. That this may be done appears from the judgment of WILMOT, C. J., in *Leasingby* v. *Smith*, 2 Wils. 406, 410. [PATTESON, J. The plaintiff does not contradict your affidavits; he would say that they furnish only half the truth. COLERIDGE, J. A man might be a common servant of the University, and a constable too.] The plaintiff might confess and avoid. [Lord DENMAN, C. J. Is it unlawful for us to receive affidavits against the claim ? If not, it is a material question why this objection was not taken sooner.] The analogy between a claim of conusance and a plea in abatement is noticed in *Hayes* v. *Long*, 2 Wils. 310, 312, judgment of BATHURST, J.; the one, like the other, should be controverted on the record. The Court does not know, here, except as it is informed by affidavit, that the plaintiff means, on a trial, to follow up his complaint as against constables, and not as against Proctors' men. By a course like that now taken here, a claim of conusance might almost always be defeated. [Lord DENMAN, C. J. I am loth to admit that, when affidavits have been made, and one side heard, we cannot go into the whole matter.] *Cur. adv. vult.*

*309]

Lord DENMAN, C. J., now delivered the judgment of the Court.

*In Hilary term, 1844, Sir *William Follett*, then Solicitor General, on behalf of the University of Cambridge, claimed conusance of an action of trespass brought in this Court, under the charter

*310]

(*a*) June 11th. Before the same Judges.

of 3 Eliz., confirmed by statute of the 13th year of the same reign. Thereby the Court of the Chancellor, Masters and Scholars of the University was constituted a Court of Record, with cognisance of all manner of personal pleas, as well of debts, accounts and all other contracts whatsoever and injuries, as of trespass against the peace, and of all misprisions within the town of Cambridge and the suburbs, where any Master or Scholar or Servitor or Common Minister of the said University should be one of the parties. The claim contained an averment that the present action was an action of trespass commenced against the Rev. W. Bates, fellow of Christ College and a Pro-proctor of the said University, together with W. Bush and C. Woods, servants of the said University: and it certified to this Court that the said W. Bates was, before and at the time of commencing the action, and still is, such Pro-proctor and fellow, matriculated and residing within the University. This claim was accompanied by a certificate of the Vice Chancellor that the said W. Bates was such member of the University; and that certificate was verified by an affidavit of the registrar. There were other affidavits in support of the claim, made by the three defendants, stating that the act for which they were sued was an act done by them in their several characters of Pro-proctor and of common servants of the University.

Cause was shown in the first instance against this rule on an exception to the jurat of these affidavits, which was overruled. Affidavits in answer had in the mean *time been sworn.(a) And, on Wednesday, the 11th of June, the matters were again brought before the Court; the plaintiff's learned counsel contending that the rule ought to be discharged, on several objections taken by them to the proceedings of the University. [*311

After argument, one of these appeared to the Court of so serious a nature that we have taken time to consider it. The plaintiff's affidavit alleges that the defendants Bush and Woods were, at the time of committing the trespasses for which the action is brought, "constables in and for the University," "appointed and acting under and by virtue of an act of parliament, entitled 'An act for the better preservation of the peace and good order in the Universities of England;' and that this action is brought against them for and in respect of acts done by them" "in execution of their said office." This act of parliament (6 G. 4, c. 97) enables the Vice Chancellor to appoint such number of able men as he shall think fit to be constables for the University, and empowers them to act within the precincts of the University and four miles beyond, subjecting them to the power of justices of the peace, and conferring upon them all the "powers and authorities, privileges, immunities and advantages" of ordinary constables. "Provided always" (his Lordship here read the proviso stated in pp. 307, 308, antè).

We cannot doubt that the plaintiff's affidavit correctly sets forth the

(a) See pp. 297—299, antè.

Evan Davies died about 1769, leaving six sons and three daughters. By his will, dated 2d April, 1766, he devised the property in dispute to his said eldest son David. On the marriage of David, in the year 1784, a fine was levied; and the property was settled (in default of issue by the marriage) to the use of the said David Davies and his heirs and assigns. The said David Davies and his wife died without issue; the former in February, 1811, the latter in October, 1815. The names of the six sons of Evan Davies were, David, John, Cæsar, Walter, Philip, and Benjamin. John, the second son, died in 1788, leaving one daughter, Elizabeth, whose legitimacy was the question ultimately in dispute at the trial. Cæsar, the third son, died in 1818, leaving three children, who all died without issue. Walter, the fourth son, died in 1823, leaving two daughters surviving, Maria and Mary, in whose right the lessors of the plaintiff claimed. Philip, the fifth son, died in 1825, without issue.

David Davies, by his will, dated 14th June, 1809, devised the property in dispute to his brother Cæsar for life, then to his nephew Cæsar, the son of the said Cæsar, for life, remainder to his male issue, and, in default of such issue, to his brother Walter for life; then to his brother Philip for life; then to his nephew, Evan John (the only son of his sister Esther who had married a person named John Rowland), for life; then to his nieces, Hannah and Mary John (daughters of his said sister Esther), and their issue; and, for want of all such issue, to his own right heirs for ever.

*316] *Hannah and Mary John died unmarried in 1823 and 1827, respectively. Evan John entered into possession, and was the last tenant for life, the previous interests having expired. He died in 1842, having, in May, 1839, purchased the reversion from Elizabeth, the daughter of John Davies, the second son of Evan Davies. The defendants claimed through Evan John. And the question on the trial was, whether Elizabeth came within the description, in the will, of the "right heirs" of the testator.

The lessors of the plaintiff sought to prove, by evidence of declarations made by various members of the family, that John Davies was never married to the woman who was the mother of Elizabeth, and that therefore Elizabeth was illegitimate; in which case, Maria and Mary would be the right heirs of the testator. It appeared, however, from the plaintiff's own evidence, that the members of the family had, in some instances, treated both mother and daughter as their relations.

In answer, evidence was tendered to prove that John Davies was married, in 1761, to one Eleanor Dillon, and that Elizabeth was the lawful issue of the marriage. This evidence was to the following effect. Elizabeth, who had been married to a person named John Stevens, died in 1841 or 1842: John Stevens died in 1815. Elizabeth had been, on some occasions, recognised by the family as a relation. But the evidence mainly relied upon was that of a Mr. John White, who had mar-

ried into the family, and who was the solicitor of Evan John, and in 1839 had acted for him in the purchase of the reversion. He stated that he had received from Elizabeth Stevens, in 1838, or early in 1839, a certificate of marriage (which he produced) in the following form.

*"February 5th, 1761. John Davies and Eleanor Dillon were lawfully married the 25th day of January 1761, as appears by the Reg^r. of St. James Bristol. "W. DAVIES, Curate." [*317

That he had received this from her when he was making inquiries of her as to her pedigree, to enable him to determine who was the person entitled to the property; but that he had not mentioned to her the object he had in view; and that he did not know at the time that there was anything in dispute. He was then asked whether, at the time, she had made any statement respecting her mother's marriage. The question was objected to, but allowed: and the witness said Elizabeth had then told him that she had received it from her mother, as being her marriage certificate. That Evan John was then in possession as the last tenant for life; and that he became the purchaser of the reversion in 1839, at which time there was nothing in dispute.

The only proof of the curate's handwriting was given by the parish clerk of St. James, who produced the register of marriage for 1761, containing this entry.

"No. 989. John Davies of this parish, and Eleanor Dillon of this parish, were married in this church by banns, this 25th day of January, in the year one thousand seven hundred and 61.

"By me, W. DAVIES, Curate."

"This marriage was solemnized between us JOHN DAVIES,
"In the presence of ELEANOR × DILLON,
MICHAEL ELLIGET her mark."
JOHN MALONE.

The clerk said that he had acquired a knowledge of *William Davies' handwriting by having been clerk for seven years and a half, and thus seeing the handwriting, in different places of the register, of a person signing "William Davies," as curate; and that he believed the signature to the entry in question in the register and to the certificate to be in the curate's handwriting. This was objected to as insufficient evidence of the handwriting; but the objection was overruled. The declarations of Elizabeth Stevens in proof of the identity of the parties named in the register and certificate were also objected to, but received. [*318

The conveyance from Elizabeth Stevens to Evan John in 1839 was executed and signed by Elizabeth Stevens, describing herself as "daughter and heiress of John Davies," and by Evan John. These signatures were tendered as declarations, and objected to, but received.

Verdict for defendants.

In Michaelmas term, 1845, *E. V. Williams* obtained a rule nisi for a

new trial on the ground of the improper reception of evidence. In last Michaelmas term,(a)

Chilton and *Lucena* showed cause. The declaration of Elizabeth Stevens was admissible, the Judge having been previously satisfied that she was a member of the family. That is a preliminary question, of which the decision devolves in all cases upon the Judge. In *Doe dem. Bamford* v. *Barton*, 2 Moo. & Rob. 28, the party whose declaration the *319] Judge rejected was admitted to be illegitimate. It is true *that the question whether Elizabeth Stevens was a member of the family or not, may be said to resolve itself into the same with the issue to be tried, namely, whether the party claiming through her is entitled to the premises; and it may, therefore, be said that the jury would be called upon to decide by their verdict the very same point which the Judge had already decided previously to admitting her declaration. But although this may be the case, such a circumstance cannot alter the general rule. It was also argued, at the trial, that, inasmuch as Elizabeth Stevens's legitimacy was necessary to her right to convey, her own declaration was to be regarded as if made after *lis mota:* but her having an interest in making such a declaration is not equivalent to a *lis mota*, no dispute having existed when it was made; *Doe dem. Tilman* v. *Tarver*, Ry. & Moo. 141. The declaration here should be received on the same principle as that acted upon in the case of *The Sussex Peerage*, 11 Cl. & Fin. 85, 99, with regard to the writing in the prayer book. As to the deed, the signature of Evan John was at all events a declaration admissible in evidence, he being an undoubted member of the family; and his signature, coupled with the description of herself by Elizabeth Stevens, amounted to evidence given by him that Elizabeth Stevens was his first cousin. The case is therefore distinguishable from *Johnson* v. *Lawson*, 2 Bingh. 86. *Slaney* v. *Wade*, 1 Myl. & C. 338, and *Doe dem. Johnson* v. *The Earl of Pembroke*, 11 East, 504, are also authorities on these points.

The clerk's evidence as to the authenticity of the certificate and register was sufficient; *Doe dem. Tilman* v. *Tarver* (second point).

*320] **Evans* and *E. L. Richards*, contrà. Since the decision in *Johnson* v. *Lawson*, it has been undisputed law, that declarations on pedigree, to be admissible, must come from some member of the family; *Crease* v. *Barrett*, 1 C. M. & R. 919, 928, S. C. 5 Tyrwh. 448, 470; 1 Phill Ev. 229 (9th ed.); *Monkton* v. *Attorney General*, 2 Russ. & M. 158. Now, if Elizabeth Stevens was illegitimate, she was not part of the family; *Doe dem. Bamford* v. *Barton*, 2 Moo. & Rob. 28. Her declaration, therefore, either oral or by her writing on the deed, can be admitted

(a) November 16th and 20th, 1846. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and ERLE, Js.

The argument against the rule is reported by H. Merivale, Esq.

only by assuming the truth of the very fact for which it is wanted: that is, a disputed fact is to be proved by taking for granted its existence. And, till the evidence was tendered, the proof in the cause had shown illegitimacy, which strengthens the objection. The legitimacy ought to be shown dehors the evidence which it is sought to introduce on the assumption of the legitimacy; *Monkton* v. *Attorney General*. [Lord DENMAN, C. J. The Judge must decide the fact, in order to determine whether evidence of it shall go to the jury: that is no more than is constantly done in cases of handwriting. ERLE, J. Where the declarations of an agent are admissible, he may first prove to the satisfaction of the Judge, that he is an agent, and his evidence therefore admissible, though the question at issue turns upon the fact whether he be agent or not, and the jury have ultimately to decide that.] The evidence given by such a witness, that he is agent, is admissible without previously assuming the agency; the case is therefore unlike the present, where the difficulty is in getting at the *evidence of the fact without assuming the fact. [COLERIDGE, J. In *Doe dem. Molesworth* v. *Sleeman*, 9 Q. B. 298, I received evidence on an assumption the truth of which I afterwards left to the jury, telling them not to attend to the evidence unless they adopted the assumption: and though we afterwards held that I had ruled wrongly in another respect, this course of proceeding was not impeached.] At least that course should have been followed here: the jury should have been told that they were not to attend to the evidence of Elizabeth Stevens, unless they were satisfied aliundè of her legitimacy. [*321

Further, the declaration was in the nature of a declaration made post litem motam: the title of the party making it depended on the fact which she declared. This is not a "natural effusion," so as to come within the principle adopted, in *Monkton* v. *Attorney General*, 2 Russ & M. 159, by Lord Chancellor BROUGHAM from Lord ELDON.(a) In the *Berkeley Peerage Case*, 4 Campb. 401, 417, it was laid down that the rule of exclusion applied, though the party making the declaration did not know of the lis mota. This point was noticed in *Walker* v. *Countess Beauchamp*, 6 C. & P. 552, 560.

Next, the evidence of the declaration in each instance was given, not in a matter of pedigree, but only in the course of explaining the history of a document. It was therefore not admissible; *Rex* v. *Erith*, 8 East, 539, 542.

As to the register and certificate, the handwriting of the curate was not properly proved. The case does not fall within the rule stated in 2 Phil. Ev. 258 (9th ed.), "that where the antiquity of a writing, purporting to bear a person's signature, makes it impossible for a *witness to swear that he has ever seen the party write, it is sufficient that the witness should have become acquainted with his [*322

(a) *Whitelocke* v. *Baker*, 13 Ves. 511, 514.

manner of signing his name, by inspecting other ancient writings which bear the same signature, provided these ancient writings have been treated and regularly preserved as authentic documents." Here the writings are not ancient enough to come within the rule: the date of each is only 1761. The writer might well have been alive within the present century; and persons are probably living who have seen him write. [ERLE, J. It is said in note (1) to 2 Phill. Ev. 258: "No particular period of antiquity has been assigned for the introduction of evidence of this description." "Such evidence seems to be admissible, wherever, in the opinion of the judge, there is a reasonable difficulty in procuring better proof, in consequence of the remote period."] *Roe dem. Brune* v. *Rawlinge*, 7 East, 279, 282, is there referred to. In that case the writer had been dead sixty years: here nothing appears as to the writer's death. In *The Fitzwalter Peerage Case*, 10 Cl. & F. 193, the writer was proved to have died in 1751, the evidence, which was admitted, being offered in 1843. *Cur. adv. vult.*

Lord DENMAN, C, J., in this vacation (February 8th), delivered the judgment of the Court.

It was admitted that the defendants were entitled to the verdict, if one Elizabeth Stevens was legitimate; that is, if her mother was the wife of her father John Davies.

The plaintiff began, and brought forward facts to make this improba-

*323] ble, particularly the declarations of *John Davies, who was reported to have said that he had not married her, because she was a bad woman. It appeared, however, that they lived together, and passed as man and wife. Some members of the family had treated her as his wife; others had treated her daughter Elizabeth Stevens as their relation.

Witnesses were then called for the defendants, who gave additional evidence to the same effect: and then an attorney produced a certificate of the marriage of John Davies with Eleanor Dillon, and stated that he had received it from Elizabeth Stevens when he was inquiring into the pedigree. He was then asked whether Stevens made any statement respecting her mother's marriage; and the question was objected to on various grounds.

First: That she was not yet conclusively proved to be a member of the family. The answer is, that it was the duty of the Judge to decide whether it was proved to him: and he decided that it was. There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting vivâ voce evidence; and apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings; and stamp to certain written instruments: and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The Judge alone has to

decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides; and he has no right to ask the opinion of the jury on the fact as a condition precedent. See *_Bartlett_ v. _Smith_, 11 M. & W. 483. In this case the Judge thought the condition had been fulfilled; and we are of the same opinion. [*324

It was further objected, that the question, whether Elizabeth Stevens was a member of the family, was in fact the issue for the jury, as she was not contended to be so unless she was legitimate; and, if she was decided to be legitimate, her declarations to prove her legitimacy were superfluous. The answer is, that neither the admissibility nor the effect of the evidence is altered by the accident that the fact which is for the Judge as a condition precedent is the same fact which is for the jury in the issue.

It was further objected that the evidence of the declaration of the delivery of the marriage certificate to Elizabeth Stevens by her mother ought not to have been received. But the handing down of pedigree papers is a fact which may be proved by declaration, according to the class of cases where family pedigrees have been held admissible by reason of their being handed down from past generations. But this declaration appears to us to be no more than the act done, the handing her marriage certificate from her own keeping to that of her daughter.

We must now consider the objections to this copy of certificate. It was signed with the name of the person who appeared in the register of a parish at Bristol as the officiating curate in 1761. The clerk who produced it said he had seen the same signature at several places in the original register; and he believed it to be the same from the knowledge so acquired of that clergyman's writing. But there was no witness to speak to his death, *or to show when he died; nor was any search made for witnesses who might have seen him write, and would have been able to form an opinion whether the writing was his. We are of opinion that quite enough was done. He must have been at least twenty-three, fourscore years ago: it was not surmised that he was a kinsman of the parties, or in any way known to them. To seek about for all persons bearing his name, in order to identify the individual and speak to his character of writing at that great distance of time, would have been a useless waste of labour. As curate of the parish, he was the proper officer to give out such a document: and the proof of his writing, as such, was the same as that received in respect to entries by corporate officers, stewards, &c. [*325

The last disputed piece of evidence was a deed to which Elizabeth Stevens, then Davies, was a party, under the description of daughter and heiress of John Davies; and one Evan John, an undoubted relation, was also a party. Evan John was the tenant for life of the property in

question: and she joined with him in conveying it to those under whom the defendants claimed to hold. Here was the declaration, therefore, both of Elizabeth Davies and of Evan John. It was objected to on account of the interest they had in making out things to be as there represented; and at least this intention of disposing of the property was said to be equivalent to a lis mota. But we think that this objection also fails. No dispute existed: but the parties did what they had a right to do, if members of the family. Almost every declaration of relationship is accompanied with some feeling of interest, which will often cast suspicion on the declarations, but has never been held to render them inadmissible.

*326] *One remark is alone required. The case of *Doe dem. Bamford* v. *Barton*, 2 Moo. & Rob. 28, which was the most relied on for the plaintiff, is wholly foreign to the present. But, in the course of it, my brother PATTESON properly said that the Courts are not disposed to extend this privilege of proving facts by declarations. We agree. And, because on the trial of this cause it was not extended beyond the principles that have often been approved and acted on, the rule nisi for a new trial must be discharged. Rule discharged.

MUSGRAVE *v.* EMMERSON.

A cognisance in replevin acknowledged the taking as for a distress for arrears of a fee farm rent, alleging that B. "was seised, as of fee and right, of and in a certain annual fee farm rent, of 1*l.* 9*s.* 3*d.*, payable for and in respect of, and issuing and payable out of," the locus in quo. Title was then traced from B.; and it was alleged, that the rent "had been duly answered and paid for the space of three years within the space of twenty years next before the first day of the session of Parliament beginning and holden at Westminster the 23d day of January, 1727, in the 1st year of the reign of the late King George the Second, and from thence continued by several prorogations to the 21st January, 1731, being the 4th session of that parliament."

Held sufficient, after verdict, under stat. 4 G. 2, c. 28, s. 5, though neither the origin nor nature of the fee farm rent was further shown.

Issues being joined upon pleas traversing the original seisin of the rent, and the payment for the three years, books were put in, which the present receiver, who, as such, had custody of the rentals and title deeds, produced from his own custody. These books contained rent rolls for many years, with entries of sums received in respect of the several rents therein contained, and among others the rent in question. The books were not signed. He also produced a paper from the same place, signed by E. R., deceased, wherein E. R. debited himself with the receipt of an aggregate rental (not stating the items) of between 700*l.* and 800*l.*, corresponding almost exactly with the aggregate of the rentals in the books.

Held, that the account and books might be connected, as an entry by a deceased person charging himself, and were evidence for the jury of the payment of the rent in question.

Under stat. 4 G. 2, c. 28, s. 5, it is sufficient that the rent has been paid for three years severally complete within the twenty years before the first day of the session of parliament mentioned in that clause, though such three years be not consecutive.

REPLEVIN, for taking, on 17th June, 1842, in the township of Dalton, in the parish of Kirkby Ravensworth, Yorkshire, a dwelling house

*327] there called *Dalton Mill, the goods and chattels, to wit, one clock, &c., of plaintiff, and unjustly detaining, &c.

Cognisance by defendant as bailiff of the Right Honourable John Earl Brownlow, the Right Honourable Edward Herbert Earl Powis and Wilbraham Egerton, Esquire: That John William, Earl of Bridgewater, since deceased, "long before and at the time of his death, was seised, as of fee and right, of and in a certain annual fee farm rent of 1*l.* 9*s.* 3*d.*, payable for and in respect of, and issuing and payable out of, the said dwelling house in which, &c." The cognisance then alleged a devise by the Earl of Bridgewater of the fee farm rent unto, and to the use of, the said Earl Brownlow, the said Earl Powis, and one Sir Charles Long, since deceased, their heirs and assigns for ever: That the said Earl of Bridgewater afterwards, to wit, 21st October, 1823, died seised of the fee farm rent, without altering his will as to the devise thereof. That afterwards, and before the time when, &c., to wit, 18th January, 1838, Sir C. Long died. That afterwards, and before the time when, &c., to wit, on 27th and 29th June, 1840, respectively, by lease and release (profert), Earl Brownlow and Earl Powis conveyed the fee farm rent to George Atty and his heirs, habendum to G. A. and his heirs to the use of the said Earl Brownlow, Earl Powis and Wilbraham Egerton, their heirs and assigns for ever. By virtue of which, &c., before the time when, &c., Earl B., Earl P. and W. E. "became and were, and from thence hitherto have been, and still are, seised and entitled of and in the said fee farm rent; which said rent had been duly answered and paid for the space of three years within the space of twenty years next before the first day of the session of Parliament beginning and holden at *Westminster the 23d day of January, 1727, in the 1st year of [*328 the reign of the late King George the Second, and from thence continued by several prorogations to the 21st of January, 1731, being the 4th session of that parliament." And, whilst the said John Earl Brownlow, E. H. Earl P. and W. E. were "so seised and entitled to the said fee farm rent as aforesaid," a large sum, &c., to wit, 6*l.* 19*s.* 7*d.*, "for arrears of the said fee farm rent, became due, in arrear and unpaid to" the said Earl Brownlow, Earl P. and W. E., and from thence, until and at the said time when, &c., was in arrear, &c.; and defendant, as bailiff (as before), acknowledged the taking for a distress for the arrears, which still remain due, &c., to Earl Brownlow, Earl P. and W. E. Verification.

Pleas in bar. 1. That the said Earl of Bridgewater "was not seised of the said annual fee farm rent, in the said cognisance mentioned, in manner and form as therein is alleged:" conclusion to the country. Issue thereon.

2 and 3. Other traverses of fact. Issues thereon.

4. "That the said rent had not been duly answered or paid for the space of three years within the space of twenty years next before the first day of the session of Parliament in the said cognisance mentioned, in

manner and form as therein is alleged:" conclusion to the country. Issue thereon.

5. A plea, with a verification. Replication traversing the fact. Issue thereon.

On the trial, before POLLOCK, C. B., at the Yorkshire Summer assizes, 1844, the defendant, in support of the issues on the first and fourth pleas, called a witness named Rayson, the present receiver. Rayson
*329] produced *certain books, containing the amounts of the rents of the different parcels of the property of which the present rent was alleged to be parcel; and, among other parcels, there appeared entries of a rent of 1*l.* 9*s.* 3*d.*, sometimes for "Dalton" and sometimes for "Dalton Mill." There were entries of this sort for successive years, each containing a column, stating the amounts of rents respectively due for the several parcels, and another column containing the sums stated to be received in respect of the same severally. These books, however, were not signed. The first which was tendered showed the receipt of a whole year's rent at Lady-day 1717. On the cover of this book was written "Fee farm rents received for the Honorable William Henry and Charles Egerton, Esquires, at Michaelmas 1716, and Lady-day 1717, accounted for September the 11, 1717." The second which was tendered showed a receipt of a whole year's rent on Lady-day 1718, and of half a year's rent at Michaelmas 1718. On the cover of this book was written "Fee farms received for the Honorable William, Henry and Charles Egertons, the three younger sons of y^e^ Lady Jane, Countess Dowager of Bridgewater, Michaelmas 1717, Lady-day 1718, and Michaelmas 1718." Rayson stated that these books were in his custody as receiver. The plaintiff's counsel objected that they were not admissible in evidence, inasmuch as no party appeared to charge himself thereby: and the Lord Chief Baron rejected the evidence. Rayson then produced a written paper, which he said that he had taken from the same box in which the books were kept. It was headed "Edward Rawsthorn, acco^t^, debtor to the Honour^ble^ Collonell William Egerton, and also to the
*330] Honour^ble^ Doctor Henry Egerton and Charles *Egerton Esq., for the estate of fee farms within the county of Yorke." It was signed "E. Rawsthorn." Rawsthorn, in this paper, debited himself with the receipt of four half years' rents due Michaelmas 1717, Lady-day 1718, Michaelmas 1718, and Lady-day 1719. The parcels were not stated, but only the aggregates, amounting to between 700*l.* and 800*l.* per annum. Rayson stated that he had compared these aggregates with the aggregates in the books first mentioned, and that they corresponded almost exactly. The defendant's counsel then proposed to put in this account and the books, as documents connected with one another: the plaintiff's counsel objected; but the Lord Chief Baron said that he thought they constituted evidence to go to the jury, and received them. Proof was given, by similar evidence (except that there was no indorse-

ment on the cover of the book), of the receipt by Rawsthorn of three half years' rents at Lady-day 1726, Michaelmas 1726, and Lady-day 1727.

The plaintiff's counsel then objected that there was no payment shown for three consecutive years before the 21st of January, 1731. The Lord Chief Baron overruled the objection: and the defendant had a verdict on all the issues.

In Michaelmas term, 1844, *Bliss* obtained a rule nisi for a new trial on the grounds of improper reception of evidence, and of misdirection; and also for arresting the judgment,(*a*) on the ground that the cognisance did not show the origin of, and title to, the fee farm rent.

In Michaelmas term, 1845,(*b*)

**Watson* and *Hugh Hill* showed cause. As to the motion in arrest of judgment: If the rent existed before the statute of quia [*331 emptores (18 Ed. 1, c. 1), the distress is lawful: if it originated later, the distress is given by stat. 4 G. 2, c. 28, s. 5, which enacts: "That from and after the 24th day of June, 1731, all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck, rents of assize and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of this present session of parliament,(*c*) or shall be hereafter created, as in case of rent reserved upon lease." The cognisance shows such a rent. It is contended that the origin of the rent should be shown, whether by grant or prescription. But this is true only of estates less than fee: here a seisin in fee is alleged. It would be often impossible, in the case of an ancient rent, to show the origin. This is the form adopted in 8 Wentw. Pl. 119. The essential defence is raised by showing a fee farm rent within the words of the statute; *Bradbury* v. *Wright*, 2 Doug. 624. At the utmost, this objection could be good only on special demurrer: here it is after verdict; and it is enough that a good title in substance is alleged, though not with strict particularity.

Secondly, the evidence was properly admitted. The signed accounts corresponded in amount(*d*) with the books containing the detailed rental nearly enough to entitle the Judge to submit the two together as evidence of the existence and payment of the rents, as detailed in *the books. The documents come from the proper custody; and [*332 the books were entitled to the same consideration as the counterpart of the lease which, in *Doe dem. The Earl of Egremont* v. *Pulman*, 3 Q. B. 622, was held admissible because it came from the muniment

(*a*) See post, p. 333, note (*c*).

(*b*) November 26th. Before Lord DENMAN, C. J., WILLIAMS and WIGHTMAN, Js.

(*c*) January 21st, 1731.

(*d*) It was also suggested that the accounts and books (which were shown to the court on this argument) were in the same handwriting; but *Bliss* said that this had not been pointed out at the trial.

room of the alleged lessor. Books appearing to be receivers' books and to contain acknowledgments of the receipt of moneys by such receivers, since deceased, are admissible; *Doe dem. Webber* v. *Lord George Thynne*, 10 East, 206.

Lastly, it was not necessary to show, under stat. 4 G. 2, c. 28, s. 5, payment of the rent for three consecutive years. Payment for a continous portion of two years was shown, and also payment for a continuous portion of one year and a half, all within the twenty statutable years. It will be argued that, as the words "space of twenty years" necessarily signify a continuous space, so must the words "space of three years." But the Court will not, by such an implication, restrain the effect of a remedial statute, which ought to be construed liberally. Besides, the words "within the space" necessarily imply continuous time: but that is not so as to the words "for the space."

Bliss, contrà. First, the cognisance ought to have shown how the rent originated. Stat. 4 G. 2, c. 28, gives the distress, but not this form of cognisance. A fee farm rent is a rent issuing out of an estate in fee, and bearing, at its origin, a given proportion to the value of the land. The authorities on this point are collected in *Bradbury* v. *Wright*, 2 Doug. 624, 627, note [1]. It must be either a rentcharge, a rentseck
*333] or a rent-service. It cannot be a rent-service *unless it existed before the statute of quia emptores; and, if this be not shown, no intendment can be made that the fact is so. And there can be no rentcharge or rentseck without a grant by deed from the lord or tenant of the land. Before stat. 11 G. 2, c. 19, s. 22, it was necessary, in all avowries and cognisances for rent arrear, to show how the rent originated, and the title of the distrainor; *Silly* v. *Dally*, 1 Ld. Raym. 331, is an instance: but that statute applies only to rent service, and not to a rentcharge or rentseck; *Bulpit* v. *Clarke*, 1 New Rep. 56; where the objection arose on general demurrer. The objection is, not that the title is insufficiently set forth, but that no title appears; and this is fatal after verdict.(*a*) The allegation of a seisin in fee of the rent shows no title: it merely asserts a payment of some part of the rent; and the allegation of payment for three years of course shows as little. The allegation of seisin of the rent seems to have been introduced by stat. 32 H. 8, c. 2, in addition to the allegation that showed the commencement of and title to the rent and was traversable: *Bevil's Case*, 4 Rep. 6 a, 7 a, 8 a. Title and seisin are both necessary to give authority to distrain. All the precedents in the reports and entries aver both title and seisin. In *Bradbury* v. *Wright*, 2 Doug. 624, the origin of and title to the rent, as well as the seisin of it, were shown in the cognisance.

(*a*) *Bliss* also urged that he had objected, at the trial, to the want of proof as to the nature of the rent; and that the objection had been overruled on the ground that the cognisance contained no allegation as to this. He contended, therefore, that, if the objection came too late after verdict, he was entitled to a new trial. As to this, the Court expressed no opinion.

It is no answer to this objection, at law, to say that the *origin of ancient rents often cannot be ascertained: the relief is in equity; *Duke of Bridgewater* v. *Edwards*, 6 Bro. P. C. 368, which shows the validity of the legal objection. [*334

Next, as to the evidence. It is essential, as conceded, to the admissibility of the books containing the details of the rents that they should be connected with the signed receipt. Now the only connection suggested is that the gross sums in the latter do not much differ from the aggregates of the several items in the former. No case has gone so far as to warrant the connection of documents on so slight a ground: even if the coincidence were exact, it would be insufficient for this purpose. In *Baron De Rutzen* v. *Farr*, 4 A. & E. 58, the accounts of a person who professed to be a clerk to a steward were rejected, because he did not appear to have been clerk except by the account itself, though they were merely receipts to a rental, and other payments of the same rent had been properly proved. In *Stead* v. *Heaton*, 4 T. R. 669, and *Higham* v. *Ridgway*, 10 East, 109, entries were received as connected with other entries in which parties charged themselves: but in those cases the reference from one writing to the other was express. The identity of names in the indorsement and headings stops far short of that. [Lord DENMAN, C. J. I think there is not much in the indorsement.] It is true that here both documents came from the same custody: but that is not the custody of a party charging himself. For aught that appears, these books containing the details of the rents may have been made by the persons who claimed the right. [*The Court* intimated that the evidence was unobjectionable.]

*Lastly, the word "space," occurring twice so closely in stat. 4 G. 2, c. 28, must have a uniform interpretation: and it is conceded that "the space of twenty years" means continuous time. If the meaning had been otherwise, the expression would have been "three times yearly answered," or words to the same effect. *Cur. adv. vult.* [*335

Lord DENMAN, C. J., in this vacation (February 8th), delivered the judgment of the Court. After stating the nature of the action, and the material pleadings, his Lordship said:

Upon the trial, a verdict was found generally for the defendant; and a new trial was moved for upon two grounds: First: The improper reception of certain accounts in evidence; and secondly: That there was no evidence that the rent had been paid for the space of three years *continuously* within the space of twenty years before the 23d of January, 1727.

The first objection was disposed of upon the argument, as we were clearly of opinion that the accounts were properly admitted.

With respect to the second objection, the evidence was that the rent had been paid during the years 1716, 1717, and part of 1718, and afterwards during 1726, and to Lady-day, 1727, making in the whole a

space of four years,(a) but not continuously. The question was, if this was sufficient to satisfy the words of the statute 4 G. 2, c. 28, s. 5. And we think that it is. The statute says that every person shall have the like remedy by distress in cases of chief rents "which have been *duly answered or paid for the space of three years, within the space of twenty years before the first day of" the then session of parliament. No case was cited in support of the position that the three years mentioned in the statute must be continuous; nor are we aware of any in which it has been so considered; nor do either the words or the spirit of the statute require such a construction. It appears to us sufficient if for the space of three *whole* years within twenty years before the passing of the act, the rent was paid, though those years may not be consecutive.

*336]

An objection was also taken to the avowry, in arrest of judgment, that it was bad after verdict, as it ought to have shown the origin of the rent, and not have commenced with an allegation of a seisin in fee of the rentcharge; and that no right to distrain was shown upon the face of it. Several cases were cited in support of the first ground of objection, and particularly the case of *Bulpit* v. *Clarke*, 1 New Rep. 56. But, without giving any opinion as to what our judgment would have been had this question arisen upon demurrer, it appears to us that it is too late to take the objection now, it being at most a defective statement of title, which is cured by verdict. There is no legal objection to the allegation of seisin in fee of a fee farm rent: and it is the usual mode of describing such an interest in the rent in pleading, as in *Bradbury* v. *Wright*, 2 Doug. 624. With respect to the right to distrain, it was decided, in the case of *Bradbury* v. *Wright*, already cited, that a fee farm rent may be distrained for under stat. 4 G. 2, c. 28, provided the *case is brought within the fifth section, as it is in the present case.

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We are therefore of opinion that the present rule must be discharged generally. Rule discharged.

(a) See antè, pp. 329, 330.

GOSLING *v.* VELEY and Another.

(Decided, February 8th.)

Reported, 7 Q. B. 406.

WILLIAMS, Assignee of BROWN, an Insolvent Debtor, *v.* CHAMBERS. *Feb.* 25.

The assignee of an insolvent debtor cannot recover in respect of work and labour performed by the insolvent, and necessary for his maintenance, after the making of the vesting order (stat. 1 & 2 Vict. c. 110, s. 37), and before the insolvent's discharge.

Though it appear that the defendant had not paid the insolvent before the assignee interfered.

ASSUMPSIT by the assignee of the debts, estate, and effects of Frederick Lewis Brown, heretofore an insolvent debtor, according to the statutes, &c. The first count of the declaration alleged that defendant, after the making of a certain order by the Court for the relief of Insolvent Debtors in England, for vesting the estate and effects of the said F. L. Brown, according to the form of the statute, &c., "and after the estate and effects of the said F. L. Brown became vested in the plaintiff as such assignee as aforesaid, and before the final discharge of the said F. L. Brown in pursuance of the said statute, to wit," 1st June, 1845, "was indebted to the plaintiff, as such assignee as aforesaid, in the sum of 131*l.* 14*s.*, for the work and labour, care, diligence, journeys, and attendances of the said F. L. Brown by him, before his said discharge, done, performed, and bestowed as the *agent of and for the defendant, at his request, and for certain commission and reward, due and of right payable from the defendant in respect thereof." Promise to plaintiff, as such assignee, to pay. Breach, nonpayment, to the damage of plaintiff as such assignee. [*338

Plea (3) to 1st count. "That the said work and labour, care, diligence, journeys, and attendances of the said F. L. Brown, by him done, performed, and bestowed, as the agent of and for the defendant, as in the said first count mentioned, were, and every part of the same was, merely the personal labour of the said F. L. Brown in this behalf done, performed, and bestowed respectively, after the making of the said order by the said Court for vesting the estate and effects of the said F. L. Brown, and were, and every part of the same was, then done, performed, and bestowed, in and for the necessary present maintenance, support, and livelihood of the said F. L. Brown and his family; and that the moneys, commission and reward, due and payable from defendant in respect of the said work and labour, care, diligence, journeys, and attendances of the said F. L. Brown were not more than sufficient for the said necessary maintenance, support, and livelihood of the said F. L. Brown and his family." "That, before the commencement of this suit, and before the plaintiff, as such assignee as aforesaid, had at all intervened and interfered in that behalf, or had made any claim or demand whatsoever upon or from the defendant in respect of the said moneys, commission, and reward, due from the defendant in respect of the said work and labour, &c., "of the said F. L. Brown, or any part of the same, to wit," 1st June, 1845, "defendant paid to the said F. L. Brown all the

*339] said moneys so due for the said work and labour," &c., "of *the said F. L. Brown, and for the said commission," &c. Verification.

Replication. That defendant did not, before plaintiff as such assignee had at all intervened or interfered in that behalf or had made any claim or demand whatsoever upon or from defendant in respect of the said moneys, commission and reward due from defendant in respect of the said work, &c., of F. L. Brown, or any part of the same, pay to F. L. Brown all or any of the said moneys so due for the said work, &c., of F. L. Brown, and for the said commission, &c., due and payable in respect of the same, in manner, &c. Conclusion to the country.

General demurrer. Joinder.

The case was argued in last term.(*a*)

Cowling, for the defendant. The fact traversed is immaterial to the defence. Stat. 1 & 2 Vict. c. 110, s. 37, enacts that the vesting order shall "vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee." "Such debts as aforesaid" are "all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid." This enactment only makes the case similar to that of an uncertificated bankrupt under stat. 6 G. 4, c. 16, s. 63, where the words are to the like effect, "all debts due or to be due to the bankrupt wheresoever the same may be found or known." And this last enactment did not alter the old law, under which it was decided that an uncertificated bankrupt might maintain assumpsit for work and

*340] labour performed, *after the assignment, for the necessary maintenance of himself and his family; *Chippendall* v. *Tomlinson*, 4 Doug. 318. According to Mr. East's note of that case, 7 East, 57, note (*g*), BULLER, J., there said: "the bankrupt had an undoubted right to sue for the profits of his labour; but supposing a person in his situation should gain a large sum of money or considerable effects, then such money and effects would undoubtedly be liable to his assignees." In 1 Cooke's Bankrupt Laws, p. 431, where the case is also given, Lord MANSFIELD is reported as saying: "The assignees cannot let out the bankrupt; they cannot contract for his labour." In *Silk* v. *Osborne*, 1 Esp. N. P. C. 140, this doctrine was recognised, and extended to materials found by the bankrupt in the course of such work and labour. In *Hesse* v. *Stevenson*, 3 B. & P. 565, 578, Lord ALVANLEY, delivering the judgment of the Court of Common Pleas, recognised the same limitation of the right of the assignees. He says: "Can there be any doubt, that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot indeed take the profits

(*a*) January 26th, 1847. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

of his daily labour. He must live." In *Ex parte Walters*, 2 Mont. D. & De G. 635, it was held that a bankrupt was not bound to account to his assignees for money received since the bankruptcy for surveying and valuing tithes, on the ground that this was the fruit of his personal labour. In *Coles* v. *Barrow*, 4 Taun. 754, the Court of Common Pleas went still farther, and held that an uncertificated bankrupt might recover from his own assignees for work and labour performed by him for the benefit of the estate, evidence being given of their having so employed him, and *made payments to him from time to time in respect of such em- [*341
ployment. In *Herbert* v. *Sayer*, 5 Q. B. 965, since stat. 6 G. 4, c. 16, the Court of Exchequer Chamber, reversing the judgment of this Court, held that an action may be maintained by an uncertificated bankrupt in respect of property acquired after the assignment, if the assignees be not shown to have interfered. It is clear from the language of the Court of Exchequer Chamber, 5 Q. B. 981, that the only ground on which the assignees acquire a right in the proceeds of contracts of the uncertificated bankrupt made after the bankruptcy is that he may be considered to contract for his assignees. That ground fails where such a contract cannot be implied, as where he has laboured merely for his necessary maintenance and support, which is the allegation on this record. [PATTESON, J., referred to *Drake* v. *Beckham*.(a)] Sect. 37 of stat. 1 & 2 Vict. c. 110, directly excepts from the operation of the vesting order the "working tools and implements" of the insolvent: a provision which clearly contemplates his employing himself in labour. A similar inference arises from the power given to the Court, by sect. 38, to discharge the insolvent, on recognisances for his appearance, after order to bring him up.

Butt, contrà. Either the traverse is material, or the plea shows no defence. It is to be observed that this is not a case in which the assignee has not interfered: he sues for the money, which, as the demurrer admits, *has not been paid before his intervention. Sub- [*342
ject to such interference, the insolvent may undoubtedly sue. *Chippendall* v. *Tomlinson*, 4 Doug. 318, and *Silk* v. *Osborn*, 1 Esp. N. P. C. 140, are, therefore, not adverse to the plaintiff. Under sect. 37 of stat. 1 & 2 Vict. c. 110, the future debts vest absolutely, by the order, in the assignee. There is no express decision on the subject: but the general principle now relied on was recognised in *Ford* v. *Dabbs*, 5 M. & G. 309. *Herbert* v. *Sayer* is in accordance with this, and fully explains *Kitchen* v. *Bartsch*, 7 East, 53, where, as here, it appeared on the record that the assignees had interfered before payment, and it was therefore held that the bankrupt could not sue. The same principle is affirmed in *Drayton* v. *Dale*, 2 B. & C. 293, 298; and *Webb* v. *Fox*, 7 T. R. 391, does not contradict it. [PATTESON, J. The plaintiff insists on the

(a) 11 M. & W. 315, in Exch Ch., reversing (as to the question in the text) the judgment of the Court of Exchequer in *Beckham* v. *Drake*, 8 M. & W. 846.

distinction between contracts in respect of his personal labour, necessary for his maintenance, and debts accruing from other sources.] No such distinction can be drawn. In stat. 6 G. 4, c. 16, s. 114, provision is made for "such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family." That meets the argument from necessity, sometimes suggested in the older cases, as by Lord ALVANLEY in *Hesse* v. *Stevenson*, 3 B. & P. 578. In sect. 43 of stat. 1 & 2 Vict. c. 110, is a similar provision for an insolvent debtor; and there is an enactment of the same kind in stat. 5 & 6 Vict. c. 116, s. 4. [PATTESON, J. This Court appears to have recognised the distinction as to fruits of personal labour, in *Crofton* v. *Poole*, 1 B. & Ad. 568. WIGHTMAN, J. Suppose
*343] the *defendant had given the insolvent a bill for the amount due: could the assignee have insisted upon this bill being given up?] Probably the Court for the relief of Insolvent Debtors would have ordered this: but there appears to be a distinction between a debt and a bill given for a debt; *Beck* v. *Beverly*, 11 M. & W. 845.

Cowling in reply. There is no more inconsistency in admitting the general doctrine of debts passing to the assignee, and excepting the earnings of the personal labour of the bankrupt or insolvent, than in distinguishing damages recoverable for slander of the bankrupt or insolvent from debts due to the estate.(*a*) *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was a demurrer to a replication to a plea to the first count of the declaration, which stated that the defendant, after the making the vesting order by the Insolvent Debtors' Court, and after the estate of the insolvent became vested in the plaintiff as assignee, and before the final discharge of the insolvent, was indebted to the plaintiff, as assignee, for the work and labour, journeys and attendances of the insolvent by him before his discharge done and performed as the agent of the defendant, and for commission in respect thereof, and then alleged a promise to pay the plaintiff as assignee. The plea stated that the work, &c., was the personal labour of the insolvent after the vesting order, and the money
*344] payable in respect of it not more than sufficient *for the necessary support of the insolvent and his family; and that, before the plaintiff had at all interfered or made any claim in respect of it, the defendant had paid the insolvent.

The replication denied that the defendant had paid the insolvent; and the defendant demurred to the replication on the ground that the issue taken was immaterial, as the plaintiff had no right to the proceeds of the personal labour of the insolvent under the circumstances stated in the plea, whether the defendant had actually paid the insolvent or not.

By the thirty-seventh section of stat. 1 & 2 Vict. c. 110, all the real and personal estate of the insolvent, and all his future estate, right, title

(*a*) See cases collected in *Hill* v. *Smith*, 12 M. & W. 618.

and interest in or to any real and personal estate and effects which may come to him before his final discharge, and all debts due or growing due to the insolvent, or to be due to him before such discharge, shall be vested in the assignee. The plaintiff's claim was grounded upon the comprehensive words of this section, which would entitle the assignee to recover any debt accruing to the insolvent before his final discharge, either for work and labour or any other cause. It was, indeed, expressly decided, in the case of *Ford* v. *Dabbs*, 5 M. & G. 309, that a debt accruing to the insolvent between the vesting order and the final discharge vests in his assignee under the thirty-seventh section of the act. It was however contended, on the part of the defendant, that, though the assignee might be entitled to the benefits of a contract made with the insolvent, and that a debt accruing to the insolvent in respect of such contract would vest in *the assignee, yet that he could not let out the insolvent to hire, or contract himself for his personal labour; [*345 and *Chippendale* v. *Tomlinson*, reported in Cooke's Bankrupt Laws,(*a*) was cited in support of this distinction. A great many other cases were cited on both sides upon the argument, but none in which it was held that the assignee of a bankrupt or insolvent could sue for the price of the personal labour of the bankrupt or insolvent after the bankruptcy or insolvency, as a debt due directly to the assignee himself, as upon a contract made with him.

In the present case the debt in the first count does not appear to be a debt due or growing due to the insolvent, or to come within the description of estate or choses in action which would vest in the assignee under the thirty-seventh section of the act. It is claimed upon the pleadings as a debt directly due to the assignee for the personal labour of the insolvent; and, if the plaintiff were entitled to recover in respect of such a claim, we must go the length of deciding that the assignee might, in the words of Lord MANSFIELD in *Chippendale* v. *Tomlinson*, 1 Co. Bank. L. 432, let the insolvent out to hire, and contract himself for his personal labour.

Upon this ground we think that the defendant is entitled to judgment upon this demurrer. Judgment for defendant.

(*a*) Vol. I. p. 431.

*NICHOLLS *v.* STRETTON.(*a*) [*346

A deed recited that plaintiff had carried on the business of an attorney, that defendant had for four years been his salaried clerk, and had applied to him to accept defendant as his articled clerk without premium, which plaintiff consented to do on defendant's entering into the covenants thereinafter contained; and defendant bound himself clerk to plaintiff for five years by articles: It was then, by the deed, witnessed that, in pursuance of the agreement, and in consideration of 5*s*., &c., defendant did, for himself, his heirs, executors and administrators, thereby covenant with plaintiff, his executors, administrators, partners and assigns:

(*a*) See *Nicholls* v. *Stretton*, 7 Beav. 42.

That defendant should not, during the term of five years mentioned in the articles, nor at any time after its expiration, directly or indirectly, interfere or intermeddle with, or be concerned as attorney, agent or otherwise, for, any person who had already been or who should from time to time thereafter become or be, the client or correspondent in business of or with plaintiff, or any partner or partners he might admit to a share with him. or any person to whom he might sell or assign the whole or any part of his business of attorney; and that defendant should not act as partner, clerk or assistant with or to any person who should interfere or intermeddle as aforesaid: and, in case defendant should commit any breach of his said covenants, he should forfeit and pay, as liquidated damages, 100*l*. for every such breach; and each day's repetition or continuance of any interference, &c., as aforesaid should be deemed a fresh breach of covenant, and incur a new and separate penalty and right of action.

Plaintiff declared in covenant, assigning breaches in respect of persons who had been his clients before and at the time of the making of the deed, and of persons who had been his clients while defendant continued under the articles.

Held that the part of the covenant in respect of which the breaches were assigned was good, as not operating unduly in restriction of trade, and might be separated from the rest; and therefore an action might be brought on such breaches.

COVENANT. The declaration alleged that, heretofore, to wit, 2d January, 1838, by indenture between defendant of one part and plaintiff of the other (profert), the date whereof is (to wit) the day and year aforesaid, after reciting that the plaintiff had, for several years then last past, carried on the business of an attorney and solicitor, and that defendant had, for four years then last past, been one of plaintiff's salaried clerks, and that defendant applied to and requested plaintiff to accept him, defendant, as his articled clerk without payment of any premium, which plaintiff consented to do on defendant's entering into the covenants and agreements thereinafter contained; and that, by certain articles of clerkship, bearing

*347] even date with the *said indenture, and made between plaintiff of the one part and defendant of the other part, the defendant put, placed and bound himself clerk to the plaintiff to serve him during the term of five years, to the intent that defendant might thereby become entitled to make application to Her Majesty's several Courts of Common Law and Equity at Westminster, to be admitted an attorney and solicitor thereof respectively: It was witnessed that, in pursuance of the agreement, and in consideration of 5*s*., &c. (acknowledgment), the "defendant did, for himself, his heirs, executors and administrators, thereby covenant, promise and agree to and with the plaintiff, his executors, administrators, partners, and assigns, in manner following, that is to say: That he, the defendant, should not nor would, during the said term of five years mentioned in the said recited articles of clerkship, nor at any time after the expiration of such term, either directly or indirectly, interfere or intermeddle with, or be concerned, as attorney, agent or otherwise, for, any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business of or with the said plaintiff, or any partner or partners he might admit to a share or shares with him. or any person or persons to whom he might sell or assign the whole or any part of his business or profession of attorney, solicitor and conveyancer; and that he, the defendant, should not nor would act as partner, clerk or assistant with or to any person or persons who should interfere

or intermeddle as aforesaid;" and, in case defendant should commit any breach of his said covenants, &c., he should forfeit and pay, as liquidated damages, 100*l.* for every such breach: and it was declared that each day's repetition or continuance *of any interference or intermeddling as aforesaid should be deemed a fresh breach of covenant, and incur a new and separate penalty and right of action: As by the said indenture, &c. That the "plaintiff then, to wit, on," &c., "took and received the defendant as his articled clerk without the payment of any premium; and that the defendant remained and continued such articled clerk to the plaintiff for and during the term or space of five years in the articles of clerkship mentioned:" That defendant afterwards, to wit, on, &c., "upon and under and by virtue of the said clerkship, became and was duly admitted an attorney and solicitor of Her Majesty's Courts of Common Law and Equity at Westminster respectively," &c. "That, before and at the time of the making of the said indenture, certain persons, to wit, certain persons carrying on business by and under the name, style or firm of Beckwith, Dye & Kitton, one Frederick Webb and one Charles Drake, were, respectively, clients and correspondents in business of and with the plaintiff: of all which premises the defendant then," to wit, on, &c., "had notice: yet the plaintiff in fact saith that the defendant, not regarding," &c., "afterwards, and after the making of the said indenture, and after the expiration of the said term of five years," &c., "and after he had been admitted such attorney and solicitor as aforesaid, and after he had such notice as aforesaid," &c., to wit, on, &c., "and on divers, to wit, thirty, other days," &c., "did directly interfere and intermeddle with, and was concerned as attorney and agent for, the said persons so carrying on business by and under the name, style or firm of Beckwith, Dye & Kitton, contrary to the said covenant," &c.: "whereby the defendant, on *each and every of the said last mentioned days, became liable to pay to the plaintiff the said sum of 100*l.*, in the said indenture mentioned, on request." Similar interferings, &c., with Frederick Webb and Charles Drake, severally, were then charged; and like liabilities were respectively alleged to have accrued thereby. The count further alleged: "That afterwards, and after the making of the said indenture, and whilst the defendant remained and continued so articled to the plaintiff as aforesaid," to wit, on, &c., "certain other persons, to wit, one John Goldsmith Atkinson and one William Sims Sutton, became and were clients and correspondents in business of and with the plaintiff: whereof the defendant then, to wit, on," &c., "had notice: yet the defendant, further disregarding," &c.: the declaration then charged, as before, interferings, &c., with J. G. Atkinson and W. S. Sutton, severally; and like liabilities were respectively alleged to have accrued thereby. "Nevertheless the defendant (although often requested so to do) hath not paid to the plaintiff the said several sums of

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100*l.*, amounting," &c., "nor either of them," &c., "according to the tenor," &c., "of the said indenture," &c.

The defendant set out the indenture on oyer, and demurred specially. Joinder in demurrer.

The case was argued in Trinity term, 1845.(*a*)

Bramwell, for the defendant. The case may be taken as on general demurrer. The covenant was bad as being in restraint of trade, and made on consideration legally insufficient. There was nothing to bind the plaintiff to instruct the defendant; and the defendant was *not to be "concerned, as attorney, agent, or otherwise, for any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business of or with the said plaintiff, or any partner or partners he might admit to a share or shares with him, or any person or persons to whom he might sell or assign the whole or any part of his business or profession of attorney, solicitor and conveyancer." Such a covenant almost puts it in the power of the plaintiff to exclude the defendant from all business whatever; and it is much more extensive than can be required for the protection of the plaintiff. There is no limitation as to time or space. The Courts will not allow the public interest to be interfered with further than is necessary for the reasonable protection of the party imposing the condition. Here he would have been fully secured against the loss of business from the opportunities which he gave the defendant, by a covenant that the defendant should not be concerned for any one who had been the plaintiff's client before or at the time of the defendant being with him. The case therefore falls within the principle of *Horner* v. *Graves*, 7 Bing. 735, *Mallan* v. *May*, 11 M. & W. 653 (judgment on second breach), *Ward* v. *Byrne*, 5 M. & W. 548, *Hinde* v. *Gray*, 1 M. & G. 195, 203, 4: and this principle is not disallowed, but recognised, in *Hitchcock* v. *Coker*.(*b*) The grounds do not exist here on which restrictions have been held defensible, as in *Gale* v. *Reed*, 8 East, 80, 87, *Proctor* v. *Sargent*, 2 M. & G. 20.

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*But it will be argued that the covenant is good for a part; and that the good part may be severed from the bad. Now, first: the contract is a whole; and every covenant on one side is in consideration of every covenant on the other: and, if any part be void, the whole is void. This is distinctly admitted in *Waite* v. *Jones*, 1 New Ca. 656, 662, and *Jones* v. *Waite*,(*c*) by the Judges who there held the contract legal; and it is recognised in *Shackell* v. *Rosier*, 2 New Ca.

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(*a*) June 3d and 6th. Before Lord DENMAN, C. J., PATTESON, WILLIAMS and COLERIDGE, Js.

(*b*) 6 A. & E. 446, 454, in Exch. Ch., reversing the judgment of K. B. in *Hitchcock* v. *Coker*, 6 A. & E. 438.

(*c*) 5 New. Ca. 341, 351, 354, in Exch. Ch., affirming the judgment in the case last cited; S. C. affirmed in Dom. Proc.; *Jones* v. *Waite*, 9 Cl. & F. 101. See note to *Collins* v. *Blantern*, 1 Smith's L. C. 169 *a*.

634, 646, and *Card* v. *Hope*, 2 B. & C. 661. A distinction may perhaps be suggested on the ground that this is a contract under seal, and that such contracts are void only for so much as is unlawful, except in the case of infringement of some direct statutory prohibition which expressly avoids the whole of the infringing instrument, as stated in notes (4) and (*d*) to *Butler* v. *Wigge*, 1 Wms. Saund. 66 (6th ed.). But that rule, when properly explained, applies only to cases arising upon statutory illegalities; and the distinction is between cases where the statute simply prohibits the particular thing, and those where it avoids the instrument. If there were any peculiar rule on the point, applicable to all instruments under seal, it would have been an answer to the objections on which numerous deeds have been held bad; as in *Card* v. *Hope*. A divisibility seems to have been allowed in the case of a condition of a bond, in *Chesman* v. *Nainby*, 2 Str. 739; S. C. 2 Ld. Raym. 1456: (*a*) but the condition of a bond is in defeasance of the primary liability: in a contract, whether under seal or not, the whole [*352 contract on one side is the consideration for the whole contract on the other; and it would be impossible to say how much the one party was entitled to, if he was only liable for a part of the consideration. The remark made in this Court, from the Bench, in *Hitchcock* v. *Coker*, 6 A. & E. 446, that the agreement was not divisible because it was not under seal, must have been made with reference to a bond. No distinction on the ground of the instrument being under seal was suggested in *Mallan* v. *May*, 11 M. & W. 653: and the language of Lord ABINGER, C. B., as to the whole of a contract being avoided by illegality of a part, in *Thorp* v. *Cole*, (*b*) is perfectly general. But, next, the illegal part of an agreement, if separable at all, can be divided from the rest only where the objectionable words can be struck out and leave an intelligible contract. Thus, in *Mallan* v. *May*, the words "or any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the said service," might have been omitted, leaving a lawful covenant. Here the same cannot be done.

Cowling, contrà. Even without separating the different parts of this covenant, there is no more protection than the particular profession requires, the defendant being restricted only as to persons, and not as to place or time. Therefore the language of the Court of Exchequer Chamber in *Hitchcock* v. *Coker*, 6 A. & E. 454 & seq., is applicable. *Bunn* v. *Guy*, 4 East, 190, is an instance of a restriction by [*353 agreement, held good, for the protection of attorneys. In *Whittaker* v. *Howe*, 3 Beav. 383, it was held by Lord LANGDALE, M. R., that an agreement by a solicitor not to practise in any part of Great Britain for twenty years was good: that goes very far beyond the

(*a*) Affirmed in Dom. Proc.; *Chesman* v. *Nainby*, 1 Bro. P. C. 234.
(*b*) 4 Dowl. P. C. 457, 466; S. C. (not same dictum) 2 Cro. M. & R. 367, 5 Tyr. 1047.

covenant in this case. [PATTESON, J. I cannot help thinking that the Master of the Rolls there must have proceeded on the ground that the limitation was for twenty years only.] In *Hitchcock* v. *Coker*, 6 A. & E. 446, 456, it was laid down expressly that no objection arises from indefiniteness of time. So in *Mallan* v. *May* and *Archer* v. *Marsh*, 6 A. & E. 959,(*a*) restrictions unlimited as to time were held good. No line can be drawn as to duration. The possible multitude of customers is objected to: but, if they had been named in a schedule to the deed, the restriction would have been upheld, as was assumed in *Hunlocke* v. *Blacklowe*, 2 Saund. 156.(*b*) In *Rannie* v. *Irvine*, 7 M. & G. 969, a restriction was enforced which comprehended an unlimited number of customers. [Lord DENMAN, C. J. The body of customers here may alter from time to time. Could you enforce a contract prohibiting a man from dealing with such persons as you might name from time to time?] That restriction, even, is less extensive than the restriction in *Whittaker* v. *Howe*. In *Ward* v. *Byrne*, 5 M. & W. 548, the prohibition was unrestricted except as to time; on this ground the Court held the agreement bad. [PATTESON, J. I do not see how that case can be reconciled with *Whittaker* v. *Howe*.] The trade in *Ward* v. *Byrne* was
*354] that of a coal merchant: probably the different nature of the callings may account for the difference of the decisions. That seems to be the view of MAULE, J., in *Proctor* v. *Sargent*, 2 M. & G. 38;(*c*) and this may help to explain the difference of the decisions in *Horner* v. *Graves*, 7 Bing. 735, and *Gale* v. *Reed*, 8 East, 80.

But, secondly, the contract is at least good so far as it concerns the clients who carried on business with the plaintiff at the time of making the indenture or during the continuance of the articles; and the breaches are confined to these. It is true that, when any contract, whether under seal or not, is in part illegal, the whole contract fails. But that is different from the present case, where the contract is, not to do anything illegal, but only to abstain from certain acts, some of which a party cannot bind himself not to do, but may still legally abstain from doing. In such a case the law will enforce such restrictions as the party can bind himself to. The cases cited, as to this point, on the other side, are not disputed. *Newman* v. *Newman*, 4 M. & S. 66, and *Chesman* v. *Nainby*,(*d*) are cases of bonds. But *Mallan* v. *May* was on covenant; and there the Court held the plaintiff entitled to recover on a breach of the legal covenant, though a breach of an illegal one was also assigned. That case goes beyond the present. *Green* v. *Price*, 13 M. & W. 695,
*355] is exactly the present case: though it is true that error *has been brought upon that decision.(*e*) It is said that here the parts of

(*a*) See *Pemberton* v. *Vaughan*, 10 Q. B. 87.
(*b*) And see notes (1) and (*a*), in 6th ed.
(*c*) See *Mallan* v. *May*, 11 M. & W. 667. (*d*) In Dom. Proc., 1 Bro. P. C. 234.
(*e*) The judgment of the Court of Exchequer Chamber was affirmed in Hil. T. 1847; *Price* v. *Green*, 16 M. & W. 346.

the covenant are inseparable. But, if the words "or who should from time to time thereafter become," and also the words "or any partner or partners he might admit to a share or shares with him," &c., to the end of the covenant, be struck out, there will remain a covenant which will not be objected to on the other side, commensurate with the breaches. It is not necessary that the part left should be strictly grammatical. In *Hinde* v. *Gray*, 1 M. & G. 195, the breach might certainly have been divided, according to the present argument for the plaintiff; but, when that was pointed out in the Court of Exchequer, in *Green* v. *Price*, 13 M. & W. 698, the Lord Chief Baron answered that the point was not there taken. It is said that the plaintiff could not be sued upon a covenant made on a consideration which could not be wholly enforced: but that difficulty applies only to executory contracts, not where, as here, the plaintiff has already performed all his part. [PATTESON, J. I must own that I feel much pressed with the objection which you are now answering.]

Bramwell, in reply. In *Rannie* v. *Irvine*, 7 M. & G. 969, there was merely a sale of good will for a term: the contract was only not to disturb the vendee in the enjoyment of the thing sold.

The objection to dividing the legal and illegal parts of the covenant is illustrated by the argument of Lord DENMAN, C. J., in *Jones* v. *Waite*, 5 New Ca. 362, where he suggests reversing the parties, as a test whether the contract sued *on is legal. No distinction can be founded on the fact that the plaintiff has performed his part: the contract must be looked on as it stood when made. [*356 *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (February 25th), delivered the judgment of the Court.

This case must be decided in favour of the plaintiff, in conformity with the decision of *Price* v. *Green*, 16 M. & W. 346, in the Exchequer Chamber. Judgment for plaintiff.

The QUEEN *v.* HINCHLIFF and Another, Justices of the Peace of CHESHIRE. *Feb.* 25.

A woman applied at petty sessions for an order of filiation. The case was adjourned, and an order made, at the adjourned petty sessions, on the putative father, who appealed to the quarter sessions. Before those sessions were held, the attorney for the mother gave notice of abandoning his order, and tendered to the appellant's attorney 1*l.* 10*s.* for costs, which he accepted, supposing the sum to be offered in discharge only of the costs of the adjournment, and the sum being, in fact, much below the whole amount of costs. The residue being unpaid, the mother's attorney requested the justices in petty sessions to rehear the case for the purpose of making another order. On their refusal, and motion for a mandamus,

Writ refused; because the abandonment had not been completed by replacing the appellant in his original situation, and therefore the order was still in force.

A RULE nisi having been obtained for a mandamus to the above Justices, cause was shown in last term(*a*) by *Whitehurst* and *Huddlestone;* and

(*a*) January 28th and 29th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, Js.

issued under an order of the House of Commons, because it did not specify any cause for the arrest.

Per Lord DENMAN, C. J., and WIGHTMAN, J. The warrant, as framed, even if valid for the purpose of taking, did not justify any of the alleged trespasses, beyond the taking.

Per WILLIAMS, J. The warrant was not to be examined strictly like that of an inferior court, or justice of the peace; and, using the latitude of intendment allowed in construing warrants of superior courts, and coupling the mandatory part with the recital, it might be understood that the warrant ordered the officer of the House to bring the plaintiff before them for a cause which they had deemed sufficient to authorise sending for him: and for the sufficiency of that cause credit must be given to the House as to a superior Court.

Held by the Court of Exchequer Chamber, reversing the judgment of the Queen's Bench, that, if the warrant had been that of a justice of the peace or of a court acting under a special statutory authority, the objections would have been fatal. But that the warrant must be construed as process of a superior court, not appearing, on the process itself, to be beyond the scope of their jurisdiction: and, so considered, it was sufficient. And that the language of the warrant justified all the alleged trespasses.

TRESPASS. The declaration stated that defendant on 6th February, 1840, with force and arms assaulted plaintiff, and then seized and laid *360] hold of him, *and forced and compelled him to go in and along a certain passage to a certain room, and afterwards in and along a certain other passage to a certain other room, and then imprisoned plaintiff for a long time, to wit, for the space of two hours then next following, and then forced and compelled him to return through and along the first mentioned passage into the said first mentioned room, and there kept and detained him for a further long space of time, to wit, for the space of two hours then next following, contrary to law and against the will of plaintiff, whereby plaintiff was greatly exposed and injured in his credit and circumstanees; and other wrongs, &c. To plaintiff's damage of 200*l.*

Plea 1. That, before and at the said time when, &c., and during all the time in the declaration and in this plea mentioned, a parliament of our Sovereign Lady the Queen was holden at Westminster in the county of Middlesex, and was sitting there at the said time when, &c., and during all the time in the declaration and in this plea mentioned: And that, shortly before the said time when, &c., to wit, on 27th January, A. D. 1840, certain matters and things came on to be discussed and debated, and were under discussion and debate, in the said House of Commons, in respect of and concerning which it was considered by the said House of Commons to be necessary that the plaintiff should be questioned and examined at the bar of the said House: and thereupon, and for the *361] purpose of procuring the attendance *of the plaintiff, to be examined at the bar of the said House of Commons touching and concerning the matters and things aforesaid, it was afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, ordered by the said House of Commons, in pursuance of and according to the ancient usages and privileges of the said House of Commons and the law and custom of Parliament, that the plaintiff should attend the said House of Commons forthwith; of which said order the plaintiff afterwards, and before the said time when, &c., to wit, on, &c., had notice:

That plaintiff did not nor would attend the said House of Commons in obedience to the said order, but wilfully and contemptuously, without any reasonable cause or excuse in that behalf, wholly neglected and refused to do so, and disregarded the said order, and also for a long space of time, to wit, from the day and year last aforesaid until the said time when, &c., concealed and absented himself for the purpose of avoiding the attending the said House of Commons in obedience to the said order: of all which premises the said House of Commons afterwards, to wit, on the 4th day of February in the year aforesaid, was informed and had notice: That, thereupon, and in order to compel the attendance of the plaintiff at the bar of the said House of Commons, to be questioned and examined there touching and concerning the matters and things aforesaid, it was afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, ordered and resolved by the said House of Commons, in pursuance of and according to the ancient usages and privileges of the said House of Commons and the law and custom of Parliament, as follows; that is to say: That the plaintiff should be sent for, and brought before the said House of *Commons [*362 in the custody of the Serjeant at Arms attending the said House of Commons; and that the Speaker of the said House of Commons should issue his warrant accordingly: Whereupon the Right Honourable Charles Shaw Lefevre, then being the Speaker of the said House of Commons, in pursuance of the order and resolution hereinbefore last mentioned, and in pursuance of and according to the ancient usages and privileges of the said House of Commons and the law and custom of Parliament, afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, in order that the plaintiff might be brought in the custody of the Serjeant at Arms of the said House before the said House according to the order and resolution last mentioned for the purpose aforesaid, by his warrant in that behalf duly made, *after reciting therein that the said House of Commons had that day ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms attending the said House, did require and authorise the Serjeant at Arms then attending the said House of Commons to take into custody the body of the plaintiff.* Averment, that defendant then (to wit, on the day and year last aforesaid) was the Serjeant at Arms attending the said House of Commons, and that the said warrant was afterwards, and before the said time when, &c., (to wit, on the day and year last aforesaid), duly delivered by the said Speaker to the defendant, then being such Serjeant at Arms as aforesaid, to be by him executed in due form of law: By virtue of and in execution of which said warrant the defendant, as such Serjeant at Arms as aforesaid, afterwards and at the said time when, &c., gently laid his hands upon plaintiff to arrest him and take him into custody, and did then arrest him by his body, by virtue *of and [*363 in execution of the said warrant, and did then, in order to bring

the plaintiff before the said House of Commons in execution of and in obedience to the said warrant, necessarily force and compel the plaintiff to go in and along the said several passages, &c., respectively, to the said several rooms, &c., respectively, using no unnecessary violence to the plaintiff in that behalf, and did then necessarily imprison the plaintiff and keep and detain him, for and during the said several times in the declaration mentioned respectively, until defendant could bring plaintiff before the said House of Commons in obedience to the said warrant, the same being reasonable times in that behalf respectively, using no unnecessary violence and doing no unnecessary damage to the plaintiff in that behalf, as the defendant lawfully might for the causes aforesaid: which are the said several supposed trespasses, &c. Verification.

Plea 2 was the same, nearly verbatim, with plea 1, down to the averment of delivery of the warrant to defendant for execution in due form of law. It then proceeded as follows: And this defendant further says that, after the said warrant had been so delivered to him as aforesaid, and before the execution of the same by him as hereinafter mentioned, to wit, just before the said time when, &c., in the declaration mentioned, the said plaintiff was, and was found by him the defendant, within that part of Her Majesty's Palace at Westminster which then was appropriated to and used by the said House of Commons, and that the plaintiff remained and continued there until the said time when, &c., in the declaration mentioned. And defendant further says that, by virtue of and in execution of the said warrant, defendant, as such Ser-

*364] jeant at Arms as aforesaid, *afterwards and at the said time when, &c., in the declaration mentioned, gently laid his hands upon the plaintiff so then still being and being found by him within the said part of Her Majesty's said Palace at Westminster aforesaid, to arrest him and take him into custody, and did then arrest him, &c. The rest of the plea did not materially differ from the concluding part of plea 1. Verification.

Plea 3 averred the sitting of parliament before and at the time when, &c., and during all the time in the declaration and plea mentioned, &c.; and it then alleged that, shortly before the said time when, &c., to wit, on 27th January, A. D. 1840, it was ordered by the House of Commons of the said parliament, in pursuance of and in accordance with the ancient usages and privileges of the said House of Commons and the law and custom of parliament, that the plaintiff should attend the said House of Commons forthwith, upon and to answer a charge which had shortly before been made against the plaintiff in the said House of Commons, that he the said plaintiff had shortly before the last mentioned day, to wit, on the 24th day of January in the year aforesaid, committed and been guilty of a breach and contempt of the privileges of the said House of Commons; of which said order of the said House of Commons the plaintiff afterwards, to wit, on the day and year last aforesaid,

had notice. Averment, as in plea 1, that plaintiff did not nor would attend the House in obedience to the said order, but neglected, &c., and wilfully and contemptuously and without reasonable cause, &c., disregarded the same, and for a long time, to wit, &c., concealed and secreted himself for the purpose of evading and avoiding, &c.: of all which, &c. (notice to the House on 4th February, &c.): and *thereupon afterwards, to wit, on the day and year last aforesaid, it was [*365 ordered and resolved by the said House of Commons in pursuance of and in accordance with the ancient usages and privileges of the said House of Commons and the law and custom of parliament, in order to compel the attendance of the plaintiff for the purpose hereinbefore mentioned, as follows, that is to say, &c. The rest of the plea was the same as the corresponding part of plea 1.

Plea 4. After averring that a parliament was holden and sitting, &c., as in the preceding pleas: That, shortly before the time when, &c., to wit, on 27th January, A. D. 1840, it was ordered by the said House of Commons, in pursuance of and according to the ancient usage and privileges of the said House of Commons and the law and custom of parliament, that the plaintiff should attend the said House of Commons forthwith: of which said order the plaintiff afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, had notice. Averment that plaintiff did not, nor would, attend the said House of Commons in obedience to the said order, but wilfully and contemptuously, without showing or causing to be shown to the said House of Commons any reasonable cause or excuse in that behalf, wholly neglected and refused to do so: of all which premises the said House of Commons afterwards, to wit, on the 4th day of February, &c., was informed and had notice. And that thereupon, and in order to compel the attendance of the plaintiff at the bar of the said House of Commons, it was afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, ordered and resolved, &c.: the plea then stated the order of the House to send for *plaintiff, &c., and that the Speaker should issue his warrant; and continued, as plea 1, to [*366 the end. Verification.

Demurrer. To plea 1. For that the same does not show or disclose any sufficient authority to have been possessed by the defendant for the committing of the trespasses in the declaration mentioned, and in the said plea attempted to be justified; and also for that the said first plea, although it admits that the defendant committed the acts complained of by the plaintiff, yet does not show that the defendant was acting under any authority, process, warrant or proceeding known to or recognised by the law; or for what or why the said plaintiff should or ought to have attended the said House of Commons; or state or show particularly the nature of the matters or things with respect to which the plaintiff was to appear and be examined before the said House of

Commons, so as to enable the Court to judge of the necessity of such appearance and examination, or of the legality of the said order for plaintiff's appearance and examination; or for what or why he was to be amenable to the jurisdiction of the said House of Commons; or that any act had been done or committed by the said plaintiff to render it obligatory on him to attend the said House, or to enable the said House to exercise any dominion or control over him, or to confer on the said House any legal power to pass the resolution in the said first plea mentioned; nor does the said plea show any sufficient cause why the said plaintiff was not legally entitled to conceal and absent himself, and avoid yielding obedience to such order or resolution, or why, because he did not attend the said House, he would be, according to law, liable to be apprehended under any warrant or authority from the said House; nor
*367] does the said first plea state or *show that the said warrant contained any charge whatever against the plaintiff, or show why or wherefore he was to be apprehended: And also for that the said first plea is in other respects, &c.

To plea 2. Like the demurrer to plea 1, down to "warrant or authority from the said House:" the demurrer then continued: Nor does it appear, by the said second plea, how the presence of the plaintiff in the said part of Her Majesty's Palace at Westminster was any justification of the said trespasses charged in the declaration, or that the presence of the plaintiff there conferred, either of itself or in conjunction with the said order, resolution and warrant, or either of them, any right or authority upon the defendant to commit the same: Nor does the said second plea state or show that the said warrant contained any charge, &c.: as the demurrer to plea 1, to the end.

To plea 3. Like the demurrer to plea 1, only omitting the words from "or state or show particularly the nature" to "order for plaintiff's appearance and examination," and substituting "or upon what occasion or how the plaintiff had been guilty, or that the plaintiff had, in fact, been guilty, of any contempt or breach of the privileges of the said House," and adding (after the words "resolution in the said third plea mentioned)" "and for that the said third plea does not describe or state any particular contempt or breach of privilege, so that a court of law could pronounce any judgment upon the legal effect of such order or resolution."

To plea 4. Like the demurrer to plea 1, only substituting for the words from "or state or show" to "order for plaintiff's appearance and examination," these; "or the circumstances under which the said order
*368] was made, *or show any reason or authority for making the same;" and, for the subsequent words from "nor does the said plea show any sufficient cause" to "authority from the said House," these; "nor does the said last plea show why the plaintiff would be,

according to law, liable to be apprehended under any warrant or authority from the said House because he did not attend the same."

Joinder in demurrer.

The demurrer was argued in Michaelmas term, 1844, November 15th and 19th.

Kelly, for the plaintiff, contended: That the defendant, in pleading to this action, was bound to set forth the warrant(*a*) and to rest his justification upon it. 2. That the warrant pleaded was bad in law, because it stated no offence committed, or supposed to have been committed, by the plaintiff, nor any cause for the arrest; no object for which he was imprisoned; no place and no term of imprisonment; and no condition on which he was to be delivered from custody. 3. That, if the warrant was in itself bad, it could not be aided by extrinsic matter appearing on the pleas. 4. That, even if it could be so aided, no extrinsic matter sufficient to bear out the warrant appeared on the present pleas; for that the House of Commons had power to arrest only on a contempt found and adjudged against the party, and not upon a mere charge of contempt; nor for the purpose, merely, of being brought before the House to be examined.(*b*) He also urged, as objections of a more formal kind: 5. That the privilege of the House to arrest under the circumstances was not *sufficiently alleged by stating merely that the order was made, and the warrant issued "in pursuance of and according to [*369 the ancient usages and privileges of the said House of Commons and the law and custom of parliament:" but that the possession of such privilege ought to have been directly averred. And 6. That the pleas did not sufficiently aver notice to the plaintiff of the order to attend the House of Commons, general words only being used ("of which said order the plaintiff afterwards," &c., "had notice"); but that, to place a party in contempt, it should appear that notice had actually been served upon him.

Sir *F. Thesiger*, Solicitor General, maintained, first: That the defendant, being an officer of the House of Commons, was protected by the order of that House directing him to do to the plaintiff the particular act complained of, and that such order was, of itself, an answer to the action. But he forbore to argue this point, the Court having, in *Stockdale* v. *Hansard*, 9 A. & E. 1, given a contrary decision, to which they had declared their adherence in the *Case of the Sheriff of Middlesex*, 11 A. & E. 273. He observed, however, that the present case differed from *Stockdale* v. *Hansard*, inasmuch as the proceedings now called in question were alleged to have been taken in pursuance of the ancient usages and privileges of the House: and he therefore contended, 2. That, as this was averred, and admitted by the demurrer, the order was in itself

(*a*) On which point he cited note (l) to *Greene* v. *Jones*, 1 Wms. Saund. 298, and the authorities there referred to.

(*b*) See p. 402, post.

a justification, notwithstanding the judgment in *Stockdale* v. *Hansard*, unless the Court would say that the ancient usages and privileges in this
*370] respect could not legally be *exercised. But, supposing that the Court felt at liberty to go farther into the case, he argued: 3. That the powers claimed by these pleas (namely, to compel all persons to attend the House for the purpose of being examined, to compel the attendance of all persons charged with contempts of the House, and to compel the attendance of all persons, without special cause assigned(*a*)) were established by precedent and authority, were vested in the House by the law and custom of parliament, and were necessary for the discharge of its functions. 4. That the plaintiff, having contemptuously refused to obey an order of the House which they had jurisdiction to make, was liable to be arrested and brought before them in custody under a warrant in the form sanctioned by their practice, as the warrant in question was admitted by the pleadings to be. 5. That, the order being made, and the warrant issued, in a matter over which the House had jurisdiction, this Court could not inquire into the formal mode of proceeding adopted by them according to their own usage and practice: the established rule being that the Court will not attempt to review the practice of a Court exercising co-ordinate jurisdiction. 6. That the warrant, if it could be examined into, was sufficiently certain, according to the tests which have been applied to warrants issued by the superior courts, and even by justices of the peace. 7. On the question as to notice, he contended that, if the plaintiff meant to allege an actual defect of notice, he
*371] might have taken *an issue of fact: as to the sufficiency of the present allegation in point of law (the objection not being taken as a special ground of demurrer) he cited *The Dean and Chapter of Windsor* v. *Gover*, 2 Wms. Saund. 302, 305 *a* (6th ed.), and note (13) to that case.

On the question whether or not the warrant, if the proceedings were otherwise invalid, would protect the officer, the Attorney General declined to offer any argument, deeming it most fit to rest the case upon the authority of the House and the general validity of its proceedings.

Kelly was heard in reply.

The reasons urged, and the authorities cited (in addition to those above referred to), on the several points of the case, will appear sufficiently in the judgments of the Court, and in the report of the subsequent arguments and judgment in the Court of Error. *Cur. adv. vult.*

The Court being divided in opinion, judgment was now given seriatim, as follows.

WIGHTMAN, J. I am of opinion that the plaintiff is entitled to judg-

(*a*) As to the power of the House of Commons to enforce attendance without previous summons, and by merely sending the Serjeant at Arms, without written warrant, to fetch the party, the Solicitor General cited the cases of *Bainebrigg*, 1 Hats. Prec. 92, (ed. 1818); *Norton*, ibid.; *Coke's Servant*, 1 Hats. 113; *Bruerton*, ibid. 731; *Gifford*, and *Crooke*, ibid. 195. He also referred to the case of *Pemberton*, 1 Hats. 203.

ment upon the demurrer to the pleas: and I come to this conclusion for reasons which involve no question as to the privileges of the House of Commons, but depend entirely upon the form of the warrant, and the mode in which it is pleaded as a justification.

The declaration charges the defendant with seizing the plaintiff, and compelling him to go along a *passage to a room, and afterwards along another passage to another room, and there imprisoning the plaintiff, and then compelling him to return to the first mentioned room, and there still keeping him in prison. To this primâ facie trespass the defendant pleads four pleas, each setting up, in substance, the same justification. That the House of Commons, in order to compel the attendance of the plaintiff before them, made an order that the plaintiff should be sent for, and brought before them in custody of the Serjeant at Arms, and that the Speaker should issue his warrant accordingly; that the Speaker did, in pursuance of such order, and according to the usages and privileges of the House of Commons, in order that the plaintiff might be brought in custody before the House, by his warrant, reciting that the House had ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms, require and authorise the defendant (being Serjeant at Arms) to take into custody the body of the plaintiff; and that, by virtue of this warrant, the defendant did arrest the plaintiff, and did, *in order to bring him before the House in obedience to the warrant*, force the plaintiff to go along the passages and into the said rooms, and imprison him there as mentioned in the declaration. To these pleas there is a demurrer, stating, amongst several other causes, that the warrant does not show why or wherefore the plaintiff was to be apprehended. [*372

It is to be observed that the defendant justifies under the warrant of the Speaker, and under nothing else. He does not justify under the order of the House, nor under the order and the warrant taken together, but under the warrant solely. What he did, he says, was in execution of, and in obedience to, the said warrant. Admitting, then, the privileges of the House, and the *validity of their order, to the fullest extent, will the warrant, as stated in the plea, justify the defendant in doing that which, upon the face of the plea, admits he did? [*373

The warrant, reciting an order of the House that the plaintiff should be brought before them in the custody of the Serjeant at Arms, directs the defendant to take the plaintiff into custody; and there it stops. It does not direct the defendant to bring him before the House, or to take him into custody in pursuance of the order, or that he may be dealt with according to the order, but simply directs the defendant to take the plaintiff into custody. It has no conclusion stating why he is to be taken into custody, nor what is to be done with him when taken, nor how long he is to be kept.

Under this warrant the defendant justifies, not only the taking the

plaintiff into custody, but the taking him first to one place and then to another, and keeping him there in order to take him before the House of Commons, which he was *not* directed to do by the warrant.

The plea states the order of the House to have been made according to the usage and privilege of Parliament, and that the Speaker was, according to such usage and privilege, directed to issue his warrant accordingly, and that the Speaker did, according to such usage and privilege, in order that the plaintiff might be brought before the House, direct, by his warrant, that the defendant should take him into custody: but the plea does not state that, by usage or privilege, a warrant to take the plaintiff into custody, merely, was a warrant not only to take him into custody but to bring him before the House, and to do all that was necessary for that purpose.

*374] Was the defendant, then, at liberty to do more than *he was expressly directed by the warrant to do, because he would see, by the recital of the order, that it required more to be done to fulfil it than was authorised or required by the warrant itself? Or is the warrant to be construed as directing the defendant, not merely to take the plaintiff into custody, but to bring him before the House, and to do all that might be necessary for that purpose?

The terms of the warrant are precise as to the duty of the defendant: and, independently of some usage or privilege, the existence of which is not shown, there is no authority, of which I am aware, to warrant the addition, by implication or intendment, of a much greater power of disposing of the person of the plaintiff than is contained in the directions given in unambiguous terms to the defendant.

Several cases were cited, in which warrants of the Speaker in pursuance of orders of the House of Commons were set out at length; and in all of them the warrants were in terms fulfilling the orders of the House. In Sir *Francis Burdett's Case*,(a) reported in 14 East, the warrant of the Speaker recited the order of the House that Sir Francis Burdett should be committed to the Tower of London, and required the Serjeant at Arms to "take into his custody the body of the said Sir Francis Burdett, and then forthwith deliver him over into the custody of the Lieutenant of His Majesty's Tower of London." These latter words would have been quite superfluous, if a direction and authority to the Serjeant at Arms to take Sir Francis into custody, without more, would have warranted his not only taking him into custody but carrying him to the

*375] Tower of London. In the **Case of the Sheriff of Middlesex*, 11 A. & E. 273, which arose out of that of *Stockdale* v. *Hansard*, 9 A. & E. 1, and is reported in 11 Adolphus & Ellis, the warrant of the Speaker, after reciting the order of the House, required the Serjeant at Arms to take the two sheriffs into his custody and to keep them during the pleasure of the House. In both these cases, as well as in all others

(a) *Burdett* v. *Abbot*, 14 East, 1, 5, 6.

of which I am aware, the warrant of the Speaker gave to the Serjeant at Arms express authority to do all that he did in obedience to it.

The *Case of Goff*,(a) reported in 3 Maule & Selwyn, was cited for the defendant to show that the express authority given by the warrant might be extended by the recital of the order. But that case is very distinguishable from the present. That was a commitment to the gaoler, to keep the prisoner "until he should be discharged by due course of law." And it was objected that, as the commitment was not for a crime, some period for which he was to be detained should have been stated. The commitment recited an adjudication that he should be committed until he rendered an account; and it was held that, coupling the conclusion of the warrant with the recital, the time for which he was to be kept sufficiently appeared, and the conclusion, until discharged by due course of law, was explained. It is, besides, to be observed that the express terms of the warrant in that case authorised the gaolor to do all that he actually did, namely, to keep the prisoner in his custody; but here the express terms of the warrant do not authorise the defendant to take the plaintiff before the House, or to any particular place; and it is proposed to *use the recital, not to explain, but to give *additional authority* to the defendant beyond that which is given in express and definite terms. [*376

It was also contended, for the defendant, that any defects in the warrant were supplied by the averment in the plea that the warrant was made "in pursuance of and according to the ancient usages and privileges" of the House of Commons. This may be so; and the warrant, as far as it goes, may be in accordance with the usages and privileges of the House of Commons. But the averment does not include that which the defendant did beyond the authority given by the warrant, and will not remove the objection taken to the justification.

It is quite unnecessary to consider whether the defendant could or could not have justified under the order and the warrant together, by the introduction of other averments in his pleas: for he was justified under the warrant only. Whether it was by mistake or intentionally that the warrant was drawn in the form in which it is, it is not now very material to inquire. The form is unusual; and, as it seems to me, imperfect: and, without at all questioning the privileges of the House of Commons, I am of opinion that the warrant will not support the justification. And, though the objection upon which I form my opinion may perhaps appear technical and formal, it is in reality very important, as it is founded upon the principle that an authority giving the right to seize or restrain the person of another must be strictly pursued, and that defects in the express authority given to a ministerial officer to arrest cannot, when the terms are otherwise clear and precise, be supplied by intendment.

(a) *Ex parte Goff*, 3 M. & S. 203.

*377] *I therefore think that the plaintiff is entitled to the judgment.

COLERIDGE, J. It is unnecessary for me, after the judgment of my brother WIGHTMAN, to repeat the statement of the record.

It appears to me that the questions which arise on this demurrer are five. 1st. Is the warrant stated in the pleas sufficient, if examined on the ordinary principles and without reference to its having been issued by the Speaker and in obedience to an order of the House of Commons? 2d. If not, does that circumstance vary the principles on which it is to be tried, so as to make it sufficient? 3d. If not, are its defects such as prevent it from being a justification to the defendant, an officer bound, it may be said, to obey it? 4th. If so, may these be helped by the facts stated in the pleas, showing under what circumstances it issued? 5th. If so, are those facts, as stated in any one of the pleas, sufficient for the purpose?

First. The statement of the warrant, which is the same in all the pleas, is this: "after reciting therein that the said House of Commons had that day ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms attending the said House, did require and authorise the Serjeant at Arms then attending the said House of Commons to take into custody the body of the plaintiff." The warrant therefore discloses that the Speaker issued it in pursuance of an order of the House to send for the plaintiff in custody, and the command to the defendant to take him into custody. But it does not disclose that the party was charged with any offence, or had been convicted of any; still less does

*378] *it show the nature of the offence; neither does it expressly direct the Serjeant at Arms to what place to take the body of his prisoner, nor how long to detain him. If for the House of Commons, in this warrant, you substitute any other authority known to the constitution, it is quite clear that this warrant would be bad. The party sought to be arrested under it might lawfully resist, or, if arrested, would be discharged upon the return to a writ of habeas corpus. It would be a waste of time to enlarge upon this point: and I will only refer to the Petition of Right, 3 C. 1, ss. 5, and 10; Lord Coke's Commentary on Magna Charta, c. 29; 2 Inst. 52, 53, and 2 Lord Hale's P. C. 122, 123: this last the rather, because, although he is inclined in some measure to qualify the strong language of Lord Coke, yet the utmost latitude which he will allow is that there must be a "tolerable certainty in the body of the warrant for what it is, as for felony generally, though the particular is best to be expressed." But

Secondly. As this warrant issues by authority of the House of Commons, it may be answered, first, that, as to the cause of arrest, it is sufficiently stated; for the order is stated, and the order of the House is sufficient cause: secondly, that, if that be not so, still the warrants of the House are not to be dealt with as the warrants of ordinary magis-

trates, and that the form here adopted is sufficient: thirdly, that the plea avers, and the demurrer admits, this warrant to be issued in the form authorised by the law and usage of parliament, which must conclude against all objections.

The first of these answers, which, however, applies only to the omission of a statement of the cause of arrest, is founded on the supposed authority of the *House, and involves this proposition: that the House may order its officer to arrest any man and bring him in custody before them, at its mere will and pleasure, without previous summons, without charge of offence or adjudication of guilt, without any purpose to be answered, in a word without any cause but that mere will and pleasure. If this proposition be true, the cause of arrest is undoubtedly stated; and that objection to the form of the warrant fails. But is the proposition true? It is, I believe, the first time that it ever was asserted; and, as it distinctly places the personal liberty of every commoner in the land within the irresponsible power of the House, as it asserts that, whether charged or uncharged, guilty or innocent, contemptuous and disobedient or submissive and obedient, the House may imprison any one of us, it surely should have been shown by those who maintain it on what foundation it rests, what authority can be cited for it, whether it has been uniformly claimed, or whether it flows as a necessary consequence from the great duties which the House has to perform, or the general and acknowledged powers with which it is armed by the constitution. Nothing of this kind was attempted in this argument. It was not necessary for the learned argument in *Stockdale* v. *Hansard*, 9 A. & E. 1: but neither does it follow from anything there maintained. That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: it is unnecessary to attempt to do so now: I would be content to state that *they may inquire into everything which it concerns the public weal for them to know; and they themselves, I think, are intrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary, and, where attendance is required, or refused, in either stage, of summons or arrest, there need be no specific disclosure of the subject matter of inquiry, because that might often defeat the purpose of the examination. All this, however, which I not merely admit but maintain, falls immensely short of the proposition now in hand. It is to be observed that the pleas themselves, so far from resting on this, contain a full statement of circumstances, showing that, in the particular instance, the Commons were fully justified in requiring a warrant to be issued. Had the Solicitor General conceived that there was, by the constitution of Parliament, such an authority as is now contended for, it is inconceiv-

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able that a much shorter and more easily proveable plea would not have been put on the file: the mere issuing of this warrant by order of the House would have sufficed. In truth, common learning on the constitution, common justice, and common sense, equally revolt against it. If such a limitation on the birthright of Englishmen existed, so important, so remarkable in its cause and consequences, it must have been stated, though it would have been recorded with regret, I think, and something like shame, in some one of those many definitions of our most valuable right, the right of personal liberty, with which our text writers abound.

*381] I pass on to the second answer: that with regard to *the transcendent powers of the House, and its identity with the people at large, and out of respect to its great dignity, the warrants which it issues are not to be dealt with as those which proceed from tribunals co-ordinate with ourselves, or inferior. I cannot admit that the degree of strictness in which formal accuracy is to be required in warrants has been measured, or ought to be, by the dignity of the courts from which they issue. Experience has shown that the liberty of the subject, with which we are intrusted, is involved in the accuracy in point of form of legal proccedings. For that reason accuracy is required: and in that view of it it is no paradox to say that form becomes substance. The more powerful therefore the source, and the higher in point of rank, the more strictness ought we to show, the more accuracy may reasonably be required. From the wide extent of jurisdiction, indeed, in the one case, and its narrowness in the other, a different rule of intendment exists: but, with this qualification, the rule is as I have stated. And, as it is no breach of respect to suppose that the highest functionary of the most exalted Court may improvidently err in point of form, however honest his intention, and as the most mischievous results might flow to the individual or to posterity if the inaccuracy were allowed to pass into a precedent, the more mischievous in proportion to the greater power of the Court, it is no breach of respect, but a bounden duty, respectfully to set such erroneous proceedings aside. But it is trifling with language to speak of the present warrant as defective in form only. If the House cannot arrest of its own mere pleasure and without cause, to omit to state any cause, and to rely on its mere pleasure, is to proceed with one

*382] *essential of the jurisdiction absent. If the only objection to the warrant had been that it omitted to state expressly for what time the plaintiff was to be in custody, in whose custody to be kept, or whither to be carried by the Serjeant, I will not say that it might not have been answered that all these might be collected with reasonable certainty from the recitals, at least sufficiently so for the purpose of protecting the officer in his obedience. But there is nothing from which the cause for issuing the warrant can in the remotest degree be gathered.

Lastly, it is said that from the language of the pleas we are bound to understand that the form of the warrant is according to the ancient

usages and privileges of the House and the law and custom of Parliament. If the result of the language of the record is that the plaintiff has admitted this, then I also distinctly admit that he is answered: as against him, the law of Parliament must be taken to be as admitted: and, whenever a court of law finds the law of Parliament applicable to a case before it, it is as much bound to govern its decisions by it as in another case by the common or statute law of the realm. The law of Parliament is parcel of the law of England, of the same authority as any other parcel. This, therefore, is merely a question of construction. The first plea states an order by the House in pursuance of and according to its ancient usages and privileges, and the law and custom of Parliament, "as follows; that is to say: That the plaintiff should be sent for, and brought before the said House of Commons in the custody of the Serjeant at Arms," and "that the Speaker of the said House of Commons should issue his warrant accordingly." There can be no doubt that these last *words import merely that the Speaker should issue the warrant in such legal and accustomed form as will legally effectuate the [*383 order of the House: but nothing can be collected from them as to what is the legal and accustomed form: and they will not give validity to a warrant in any but the legal and accustomed form. The plea proceeds: "whereupon the Right Honourable," &c., "then being the Speaker," &c., "in pursuance of the order and resolution," &c., and "in pursuance of and according to the ancient usages and privileges of the said House of Commons and the law and custom of Parliament, afterwards and before," &c., "in order that the plaintiff might be brought in the custody of the Serjeant at Arms of the said House before" it "according to the order and resolution last mentioned, for the purpose aforesaid, by his warrant in that behalf duly made, after reciting therein that the House had that day ordered," &c. (His Lordship then stated the warrant, as in pp. 362, 377, antè). It is a maxim in the construction of pleadings that everything shall be taken most strongly against the pleader: but I prefer to consider this language without any such unfavourable leaning. It appears to me clear that, considered candidly, and by the light of common sense, all that is said of the usages of the House and the law of Parliament relates to the jurisdiction of the Speaker and his act in issuing a warrant to effectuate the resolution of the House: all that relates to the qualities of the warrant itself is summed up in the words "in that behalf duly made." But it is now settled law that the word "duly" will not supply the place of a specific allegation of any material requisite to the validity of an act. If it were requisite that this warrant should have been *under the seal of the Speaker, to allege it [*384 "duly made" would not cure the want of an averment that it was under his seal. *Everard* v. *Patterson*, 6 Taunt. 625, is an authority for this, in the Exchequer Chamber. A fortiori, it will not cure the want of an averment that it was made according to the form, and with all the

be left in blank, and no reason stated for the omission, but only an imperfect description of the individual, as—H. son of George H., it has been decided by all the judges that resistance would be lawful, and a killing of the constable not murder; *Rex* v. *Hood*, 1 Mo. C. C. 281.(*a*)

*388] Now it cannot be contended that the constable was *bound to execute what the party might lawfully resist even to the death: and the ground on which the constable's justification can alone be put, the act itself being primâ facie illegal, is that a lawful authority commanded him, and therefore made it his duty to do it.

I have examined many parts of Lord Coke and Lord Hale on this point: but it is not very easy to extract a certain rule from them, nor to reconcile them with each other. The law, with regard both to the form of warrants and the authority of magistrates to issue them, was not so accurately settled when they wrote as it has since been. Even Hawkins, at a later date, leans to the opinion that a constable "may and ought to execute a general warrant to bring a person before a justice of peace, to answer such matters as shall be objected against him on the part of the king, for that the officer ought to presume that the justice hath a jurisdiction," "unless the contrary appear; and it may often endanger the escape of the party to make known the crime he is accused of;" 3 Hawk. P. C. 175 (ed. 7), B. c. 13, s. 10. But neither this opinion nor these reasons could be maintained at this day.

In the 2d Institute, Lord Coke considers the matter of the requisites to make a good warrant in two places: in the commentary on Magna Charta, c. 29, pp. 52, 3, 4, and that on the statute De frangentibus Prisonam, 1 Ed. 2, pp. 591, 2. What he says in the latter place, which would be more unfavourable to the defendant, ought not to be relied on, because it is said with particular reference to the statute. In the former, he is treating expressly of imprisonment, lawful or unlawful, as that may

*389] depend on the goodness or badness of the *warrant. One of the requisites to make it good he asserts to be the statement of the cause on its face. Among his reasons is the impossibility of the Court dealing with the case on the return to a habeas corpus, unless the cause of the imprisonment appear; and he states that the Petition of Right has now made an end of the question. That statute, it will be remembered, recites the grievance that divers subjects had of late been imprisoned "without any cause showed," and provides against it for the future. Having shown what is an unlawful imprisonment in this, among other, respects, he comes to the remedies, and among them enumerates this action of false imprisonment, not making any distinction, it should seem, between the magistrate who issues and the officer who executes the warrant.

Lord Hale, 2 P. C., at p. 111, and also 1 P. C. 578, states his opinion that a warrant, not containing the cause *specially*, but *being only gene-*

(*a*) See *Hoye* v. *Bush*, 1 Man. & G. 775, 785.

rally to answer such matters as shall be objected, is not void, but only erroneous, and will be a justification for the officer acting under it. At p. 460 of vol. 1, he says, "although the warrant" "be not in strictness lawful, as if it *express not the cause particularly enough,* yet if the matter be within his jurisdiction as justice of peace, the killing of such officer in execution of his warrant is murder; for in such case the officer cannot dispute the validity of the warrant, if *it be under seal of the justice.*" For this he cites Yearb. 14 H. 8, 16,(*a*) which is not at all a satisfactory authority. All the Judges there seemed to think that a justice could not arrest for felony; but the majority thought, as he was a Judge of record, and had a seal *of office, the warrant under his seal would protect the officer *though the matter was out of his jurisdiction.* [*390 Again, Lord Hale, vol. i. p. 580, states that, "a general warrant upon a complaint of robbery to apprehend all persons suspected, and to bring them before, &c., was ruled *void,* and *false imprisonment lies against" the officer executing it.*

Understood in one and that the most reasonable sense, the test of jurisdiction is the safest and most generally applicable that can be suggested, the jurisdiction namely to arrest *upon the facts stated on the warrant.* If the warrant, in the shape in which it is given to the officer, is such that the party may lawfully resist it, or, if taken on it, will be released on habeas corpus, it is a warrant which in that shape the magistrate had no jurisdiction to issue, which therefore the officer need not have obeyed, and which, at common law, on the principle above laid down by Chief Justice WILLES, will not protect him against the action of the party injured. Where a cause is expressed, but imperfectly, the officer may not be expected to judge as to the sufficiency of the statement: and there, if the subject matter be within the jurisdiction of the magistrate, he may be bound to execute, and, as a consequence, be entitled to protection. Where no cause is expressed, there is no question as to the want of jurisdiction. That is this case; and I am therefore of opinion that the obedience of the defendant was voluntary and not protected by the warrant.

I come, therefore, to the fourth question: whether we may look to the facts alleged in the pleas to supply that which is wanting in the warrant itself. And I have necessarily anticipated much of what I should have said *on this point, in considering the last preceding question. [*391 Upon principle, this seems a question very easy of answer. Why is it necessary to state at all the cause on the face of the warrant? Several reasons are given: not the least important is, that the party called upon to submit to the process of the law may know what it is that is charged against him, and for what it is that he is called upon to yield himself a prisoner. If no cause, or an insufficient cause appear, he takes his measures accordingly at the time; and he must judge from the information communicated at the time. Should he

(*a*) Yearb. Hil. 14 H. 8, fo. 16 A, pl. 3.

resist, and kill or injure the officer in his resistance, and be brought to trial, it could not be contended that any fact could be added to the statement in the warrant to his prejudice. The act with which he is charged must take its character from the circumstances as they then stood. He was resisting a wrongful imprisonment, wrongful because the officer was not armed with a legal authority for arresting him; and that is the act for which he is to answer. This reasoning equally applies, if he submits and brings his action for damages. Whatever cause for imprisoning him may have existed, the action lies, because *the* imprisonment of which he complains was unauthorised and wrongful. As well might a new warrant be subsequently granted to the officer, and relied on by him as a defence, as facts be added in the plea to help out the defective warrant. These facts can only show that he might have been well arrested, not that he was, which is the question at issue. We may come nearer to the point, and suppose, not only a good cause, but a good warrant, only the constable has left it at home and arrests without any; the imprisonment clearly would be illegal; it could not be said
*392] to have been effected *under and by virtue of the warrant; and surely no averment in pleading could be allowed to cure the defect. Nor is this mere form: we are bound to look, beyond the mere instance, to the evils which the precedent might let in if any laxity were allowed in these proceedings, by which our property, our liberty, our lives are to be affected. The case thus standing upon principle, I do not find any authority cited which looks the other way. The cases most nearly in analogy are those of commitments by magistrates after conviction; and these all maintain the argument for the plaintiff; the conviction will not defend the magistrate unless the commitment agree with it, and the execution be regular; and the legislature has interposed, by stat. 7 & 8 G. 4, c. 30, s. 39, to protect defective commitments if they allege a conviction and there be a good and valid conviction to sustain them. Our own practice, on returns to habeas corpus with a certiorari bringing up the depositions in felony, proceeds on the same principle; for, if the warrant be bad, but the depositions disclose good ground for imprisonment, we do not merely remand but recommit. *Wickes* v. *Clutterbuck*, 2 Bing. 483, and *Rogers* v. *Jones*, Ry. & M. 129;(*a*) are authorities, so far as they go, the same way.

I think, therefore, that we are not at liberty to look to the facts stated in the plea for the purpose of curing the defect in the warrant. It is unnecessary therefore for me to consider their effect. It was very proper to plead them; for they show that the Speaker had jurisdiction to issue a warrant; but they do not show that the warrant he did issue was a lawful one.

*393] *I come to this conclusion with most sincere regret: I cannot but think it probable, from the admitted facts, that the House was pursuing an inquiry strictly within its province; and it is to be

(*a*) S. C. in Banc, *Rogers* v. *Jones*, 3 B. & C. 409.

lamented that its course should be obstructed by an inadvertency in the language used in the proceeding necessary to enforce due obedience to its commands, or that this Court, or any member of it, should even appear to be in conflict with it. It is a consolation that the difference is only apparent: no question of privilege is really at issue: one or two propositions have indeed been put forward, which I have been compelled to notice and dissent from; but these have not been shown to be founded on any usage of the House. We were, indeed, told that to the journals of the House we must refer for the law of Parliament in this matter; and I agree to the remark; for the law of Parliament must govern us in this case; and the usage of Parliament, meaning thereby the clear, ancient and uniform usage, is the law of Parliament. But, upon the reference, no warrant was produced in this form, or open to this censure. It was said that in earlier times the House arrested without written warrant; and no doubt that appears to be so: but this avails nothing in the argument, unless it can be shown that the Serjeant did not orally communicate to the party the cause for which he was summoned or arrested. It is perfectly consistent with what appears that he did so, and we ought to presume that he did; for we must presume that the House of Commons would proceed in the manner most consonant with reason and justice, and the analogy of the common law.

No distinction between the several pleas has been made in the argument on the part of the defendant.

*The conclusion, upon the whole, to which I have come, is that our judgment ought to be for the plaintiff. [*394

WILLIAMS, J. I have the misfortune to differ from the rest of the Court in this case. It is some satisfaction, however, to think that this difference does not arise upon any question affecting the existence or the extent of the privileges of the House of Commons. No doubt was attempted to be raised upon this point, in the argument of the learned counsel for the plaintiff. The objection to the pleas, and the right of the plaintiff to the judgment of the Court, were made to rest, exclusively, upon the form of the Speaker's warrant as set forth in those pleas. A few additional words, as I understood that argument, would have removed all doubt and difficulty from the case. If, in the warrant of the Speaker, the direction to the defendant had been, not merely to take the plaintiff into custody, but "him safely to keep during the pleasure of the House" (and I am at a loss to understand what validity the warrant can receive from the addition), I should have been unable to distinguish this case from that of the *Sheriff of Middlesex*, 11 A. & E. 273. Because, although in the present there is not, as in that case there was, a direct resolution or adjudication of a contempt, yet a contempt of the House of Commons and of its undoubted privileges plainly appears from the undisputed facts of the case.

It may be convenient, therefore, thus early in the course of the remarks

I am about to offer, to bring, at once, distinctly into notice what were the circumstances, and what the occasion, upon which the plaintiff was *395] *taken into custody by the defendant, the Serjeant at Arms of the House of Commons. And, in so doing, I shall not deem it needful to travel out of the first plea and the allegations therein contained.

It appears, then, that certain matters were under discussion in the House of Commons, and that it was considered by the said House to be necessary that the plaintiff should be examined at the bar of the said House: that it was thereupon ordered that the plaintiff should attend forthwith: that the plaintiff had notice of the said order, and did not attend, but "wilfully and contemptuously" refused so to do: and that the said House was informed and had notice thereof: that thereupon it was ordered that the plaintiff should be sent for and brought before the House in the custody of the Serjeant at Arms, and that the Speaker should issue his warrant accordingly. Then follows the warrant, which it will be necessary hereafter to notice more particularly. At present, I am only considering whether a contempt was, in fact, committed.

And, upon this part of the case, no doubt, as I believe, has been, or, as I think, can be raised. In the consideration of it, I perfectly agree with what was said by Lord DENMAN in the *Case of the Sheriff of Middlesex*, 11 A. & E. 291: "It is unnecessary" (says his Lordship) "to discuss the question" (the strong opinion of Lord Coke, however, is well known; see 4 Inst. 37, and the passages cited in argument;(a) "whether each House of Parliament, be or be not *a Court;* it is clear that they cannot exercise their proper functions without the power *396] *of protecting themselves against interference." Equally clear is it, in my opinion, that, in the exercise of their inquisitorial functions, they must have the power of enforcing the attendance of witnesses, or their authority would be nothing, and the House of Commons but the shadow of a name. The House, therefore, had an undoubted right to order the attendance of the plaintiff, and, upon his "contemptuous" refusal, to commit him for the contempt, or (as I think) to order him to be brought in custody before them, to show cause, if he had any, why he refused to attend, or to give evidence, if required. Up to this point, therefore, there is, I apprehend, no doubt, and the matter is clear: the question is, as already stated, upon the form and manner in which the authority of the House has been vindicated upon the present occasion.

The plea states the Speaker's warrant thus. Whereupon, the Speaker, in pursuance of the said last mentioned order (that the plaintiff should be brought before the House in custody, &c.), "and according to the ancient usages and privileges of the said House of Commons and the law and custom of Parliament," by his warrant duly made, "after

(a) 4 Inst. pp. 11, 23, 24, 28, were cited by the Solicitor General.

reciting therein that the said House of Commons had that day ordered that the plaintiff *should be sent for in the custody of the Serjeant at Arms*," "did require and authorise the Serjeant at Arms" "to take into custody the body of the plaintiff." Then follows the justification of the defendant, that he took him by virtue of the warrant *in order to bring him before the House*. And the question is, whether the said warrant be or be not a justification to him in the execution of his duty, no excess therein being pretended.

And, before I proceed to examine that more minutely, *I think [*397 it right to premise that all cases of warrants of commitment by inferior jurisdictions are, in my opinion, wholly inapplicable to the present. It seems to me clear that the warrant of the Speaker of the House of Commons, if brought before this Court, is judged of upon principles entirely different from those which govern the decision of the cases just referred to. The warrant in the *Case of the Sheriff of Middlesex*, 11 A. & E. 277, was in the following form: "Whereas the House of Commons have this day resolved that William Evans, Esq., and John Wheelton, Esq., Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant at Arms attending this House: These are therefore to require you to take into your custody the bodies of the said William Evans and John Wheelton, and them safely to keep during the pleasure of this House; for which this shall be your sufficient warrant. CHARLES SHAW LEFEVRE." Now this, if examined according to the rules which prevail in the cases above mentioned, is, I apprehend, manifestly defective. If a person be convicted of being "a rogue and vagabond," and committed accordingly, and facts be stated not sufficient to justify the legal inference, he is entitled to his discharge; *Rex* v. *Brown*, 8 T. R. 26. Equally defective, I presume, would it have been, if the warrant had stated a conviction of the party as being "a rogue and vagabond," without more. If commissioners commit a bankrupt for a contempt in not answering questions, this Court would discharge him if the questions were not specified, that the Court might judge of their legality; by two judges in *Ex *parte Leake*, 9 B. & Cr. 234, 240: and in *Ex* [*398 *parte Goff*, 3 M. & S. 203 (hereafter more fully noticed), a warrant of commitment for not accounting and paying over money, directing the party to be kept till "*discharged by due course of law*," would, it seems, have been held bad, if it had not been supported by previous parts of the warrant. If, as contended for in the argument for the plaintiff, convenient certainty as to the place where, and the time during which, the custody is to be, are requisite in order to make a warrant legal, that object seems to be imperfectly forwarded by the statement, that the party should be kept during the pleasure of the House. What would be thought of a magistrate's warrant, however in all other respects unexceptionable, which should direct a commitment during the pleasure of

any man or set of men whatsoever? Yet the Speaker's warrant, in the form above set forth, was sustained by this Court, and the parties applying for liberation remanded; and that, too, under circumstances which, if any such case can ever exist, would have led to an examination of it with the greatest anxiety and jealousy. And not only was such the decision of this Court; but all doubt may be considered at an end by the questions proposed by, and the answer given to, the House of Lords in *Burdett* v. *Abbot*, 5 Dow, 165, 199.(*a*)

I come now to the allegation in the plea above set forth. And, I believe, it is considered that the words, "the Speaker," "in pursuance" of the said last mentioned order, "*and according to the ancient usages and privileges of the said House of Commons and the law and custom of* *399] *Parliament*," "by his warrant in that behalf *duly made," "did require and authorise the Serjeant at Arms" "to take into custody the body of the plaintiff," simply mean that the Speaker did, in fact, make his warrant. I confess, however, that I entertain some doubt whether the allegation ought to be so restrained, or whether it is not, also, descriptive of the nature and quality of that warrant; that is, whether it is not to be understood from the allegation that the warrant was in such form as, according to the usages of the House and the law of Parliament, had been in like cases issued by the Speaker to bring a party in custody before the House. And, if so, I should also doubt whether such allegations, so understood, would not, at once, have closed the question, upon the ground that the House of Commons is competent to regulate the forms of its own proceedings, and is the sole judge of them. In the case *Ex parte Smyth*(*b*) it appeared that the Judicial Committee of the Privy Council had ordered Smyth to appear "*absolutely*:" of this order Smyth complained, and applied for a prohibition, both to this Court and to the Exchequer. Both Courts, upon the hearing, considered the question in the same manner. Was the cause within the jurisdiction of the Court below? If so, the inquiry is at an end; for the complaint respects the conduct of the cause in that Court, and with its practice we will not interfere. And this, too, in the case of an inferior Court. It is unnecessary, however, to pursue this part of the subject further, or to pronounce any decisive opinion upon it, because, in *400] another view, the warrant may, in my *opinion, be sustained, and that, even if it ought to be examined in the manner contended for by the plaintiff, it is good and sufficient in law.

Upon this part of the case, two questions, as it seems to me, arise: first, whether the recital in the warrant may be resorted to, in order to explain and support the mandatory part; and, secondly, if it may, whether such recital be sufficient for the purpose.

Now, upon the first question, *Goff's Case*, 3 M. & S. 203, above

(*a*) See p. 418, post.
(*b*) In B. R. 3 A. & E. 719, 724. In Exchequer, 2 C. M. & R. 748; S. C. Tyr. & G. 223.

referred to generally, has a strong bearing. It is, indeed, decisive to show that previous matter may have the effect of explaining and rectifying in a warrant what would otherwise be imperfect and erroneous. Goff was committed by warrant of two justices, for that he, being collector of rates for the parish of Richmond, under stat. 25 G. 3, c. 41, refused to pay over moneys, collected by virtue of the act, to W. S.; and the justices adjudged that he should be committed to gaol, there to remain until he should account and pay over the moneys to the said W. S. They then required the keeper of the gaol to receive and keep him, "*until he should be discharged by due course of law.*" For this fault, and the uncertainty of the latter part of it, the warrant was objected to; and the cases of commitments by commissioners of bankrupt, which had, therefore, been held ill, were cited. And those cases were not questioned in the argument; but reliance was placed on the *previous part* of the warrant, and, especially, the adjudication that Goff should be committed until he accounted and paid; and it was contended that the conclusion ought to be construed with reference to that which preceded it, and *so be sustained. And, per Lord ELLENBOROUGH: [*401
"coupling the premises with the conclusion, is it not in effect the same as if the warrant had directed the gaoler to detain the party until he had accounted? We must read the warrant as if the magistrates had in the conclusion recited over again the adjudication." The prisoner was remanded. The principle of this case has since been recognised by the Court of Exchequer; *Coster* v. *Wilson*, 3 M. & W. 411. It cannot, indeed, be said that the previous matter in *Goff's Case*, 3 M. & S. 203, is, *in kind*, the same as that which I am about to notice in the present: but the *principle* of reference for the purpose of sustaining the warrant is, I think, thereby established.

Upon the second question proposed a few remarks will suffice. The warrant recites an order that the plaintiff "should be sent for in the custody of the Serjeant at Arms." Now what is the meaning of "sent for in custody?" Or, rather, what can it be, but that the plaintiff was to be "brought before the House in the custody of the Serjeant at Arms?" And, if so, "coupling the premises with the conclusion" (according to Lord ELLENBOROUGH), what can be a more reasonable interpretation than that, the warrant being to take the plaintiff into custody, it ought to be understood by aid of the recited order as directing "to take him into custody for the purpose of bringing him before the House?" And, if so, the warrant, in my opinion, is perfectly legal.

In the case of a warrant of commitment by the Speaker of the House of Commons, a resolution that the party has been guilty of a contempt is requisite, but not any specification of the nature of that contempt; *and, as we have already seen, neither the time during which, nor [*402
the place where, the imprisonment is to be need be stated. Moreover, a contempt, in fact, may have been committed, or it may not:

nothing appears; but credit is given (which in the case of an inferior jurisdiction would not be) to the House of Commons, that they would not commit without a sufficient cause. At all events, this Court cannot inquire in such case. And why may not the intendment also be made, in the present instance, that the House of Commons ordered that the plaintiff should "be *sent for* in the custody of the Serjeant at Arms," or (as, I think, it must be understood) "brought before the House" in that custody, for some good and sufficient cause? For, surely, there *may* be many such. That seems to me scarcely a more forced supposition than that a contempt has been, in fact, committed, though none appears.

It remains that I should add a few words upon a point (connected with this part of the case) briefly touched upon already, but requiring perhaps some further notice. It was contended, in argument, that the *only* unobjectionable course for the House to pursue was to adjudge the party guilty of a contempt, and commit him accordingly. I cannot accede to this argument. I think that, having ordered the attendance of the plantiff as a witness, of the fitness of which the House of Commons alone had the competence to judge, they might, upon his wilful default, compel his attendance to answer for that default, and, upon that attendance, make such order respecting him as to the House might seem meet. If a witness, having notice that the House had ordered his attendance, disobeys, no further order, in the shape of a second notice, is neces-

*403] sary. *Even in the case of Commissioners of Bankrupts, if the bankrupt refuses to attend, no second summons is necessary before a warrant of commitment issues; but such warrant may go at once; *Ex parte Linthwaite*, 16 Ves. 234, 235, note (49), and *Battye* v. *Gresley*, 8 East, 319, 326. Then, what is the difference, so far as the party affected is concerned, between the two modes of proceeding? If the party be committed for a contempt "during the pleasure of the House," his chance of liberation depends upon his appearing and submitting to do what is required. If the course be pursued (as here) of ordering him to be brought in custody before the House, his opportunity of making such amends as may lead to his deliverance is more immediate; and, so far, this course is more beneficial to him. If, upon any given state of facts, a person may be sent to prison for contempt, surely he may be brought before the House, whereby he may avoid being sent to prison at all. The power in each case seems to me to be precisely similar, and to depend upon the same principle, the necessity of vesting such power in the House of Commons for the sake of the public interest and welfare.

Upon the whole, my opinion is that judgment should be for the defendant.

Lord DENMAN, C. J. This case, notwithstanding the length of the argument and the weight of the matters discussed, lies in a very narrow compass. The defendant justifies the imprisonment of the plaintiff under the

*404] warrant of the Speaker of the House of Commons, which directed the defendant to take the plaintiff into *custody, after reciting

that his presence had been required in the House by an order of which the plaintiff had notice, but to avoid obedience to which he contemptuously concealed himself.

There was no necessity for authorities to show the power of either House of Parliament to commit for a contempt. That power, which they possess in common with all the superior Courts, was fully recognised in *Stockdale* v. *Hansard*, 9 A. & E. 1, and was acted upon in a proceeding which grew out of that case, and is reported in 11 Adolphus & Ellis, p. 273, *The Case of the Sheriff of Middlesex.* That power, indeed, was neither directly or indirectly questioned by the learned counsel for the plaintiff on the present occasion. The privilege of Parliament to prosecute all inquiries which they may deem necessary for the discharge of their high duties was also admitted without dispute, and the power, consequently, to compel the attendance of all persons whom them may require for such purposes. Some doubt has been strongly and eloquently stated on the power to order a person to be brought in custody before the House in the first instance, or, at least, without apprising him of the reason for requiring it: but I confess it would rather appear to me, though sensible of the weight of these considerations, that, as the exercise of their privilege of inquiry may obviously be wholly defeated by delay, it may be necessary to secure such attendance by coercive measures without previous notice and without explanation, and that of that necessity the House alone can judge.

But the defendant rests his justification on higher *ground, [*405
and puts foremost in the points to be argued a much more extensive principle. "The defendant, being an officer of the House of Commons, is protected by an order of the House directing him to do to the plaintiff the identical act complained of; such an order, of itself and without more, is an answer to the action." Now this is the leading proposition maintained by the defendant in the case of *Stockdale* v. *Hansard;* and it was, upon examination, deliberately denied by the unanimous judgment of this Court.

To the doctrine established by that judgment I fully adhere, unquestioned as it has been in any court of error, strictly conformable, as I am firmly convinced, to the principles of our law, and essential to the existence of a free constitution. Holding, therefore, that the mere order of the House of Commons does not, of itself, legalize whatever it may enjoin, whether executed by its own officer or by any other person, I must reject this ground of defence. On the contrary, I hold that this Court is not at liberty to decline the jurisdiction of examining the grounds on which the imprisonment of any one of Her Majesty's subjects may be justified, whatever the dignity or power of those who may have caused his imprisonment, whether it be questioned in an action for damages, or on a return to a habeas corpus, or in the more solemn inquest that may be conducted in a criminal Court, in a case of life and death, where

homicide may have resulted from enforcing or opposing the order, and the judge may be compelled to decide on its legality. If, in the perform-
*406] ance of this *duty, I find the defendant justified by an order of the House of Commons, either convicting or punishing the plaintiff for a contempt, or made for the purpose of bringing the plaintiff before them for the necessary exercise of their privileges, the defendant will be of course, in my opinion, entitled to our judgment.

Here, however, it is unfortunate that serious objections are urged against the warrant set forth in the plea.

It recites that the plaintiff's presence had been required in the House of Commons; that he had notice of their resolution to that effect and the order thereupon made; but that he contemptuously concealed himself, to avoid obedience to it; and then the resolution, that he should be sent for and brought before the House of Commons, and that the Speaker should issue his warrant accordingly; whereupon the Speaker, in order that the plaintiff might be brought before the House in the custody of the Serjeant at Arms, according to the order and resolution aforesaid, by his warrant, reciting that the House had that day ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms, did require and authorise that officer to take into custody, the body of the plaintiff. Here the warrant ends. Under it, the arrest and detention of the plaintiff, and his removal to various places, are justified.

This instrument must be considered as a committal for contempt or as a means of compelling the plaintiff's attendance in the House of Commons, or perhaps as both. In both points of view it is said to be essentially defective, for omitting to state the object and end for which it
*407] was issued. If it were to enforce sentence of *contempt, the plaintiff's learned counsel insisted that some limit to that imprisonment ought to appear in it: if the intention were only to bring him before the House, that intention ought to be disclosed. The officer, it was contended, is bound to look no farther than the direction in the warrant; and that places him in the officer's custody without any intimation how long, or for what purpose, the prisoner is to be detained. The prisoner, it was also contended, has a right to see the warrant, that he may submit to it, if lawful; but, however sensible of the obligation to submit to the authority of the House, he would not be bound to undergo an imprisonment at the discretion of the officer, to whom the House had not delegated such discretion. For the Speaker's warrant was likewise impeached, as not pursuing the resolution on which it proposes to be founded, but which only directed that he should be brought before the House of Commons.

The objections were met in various ways. First, it was said that the resolution set forth in the plea, that the plaintiff should be brought before the House, may be incorporated into the warrant which requires the serjeant to take him into custody. But, at common law, every war-

rant must speak for itself, and must show two things, a good cause for depriving the party named of his liberty, and some lawful period for his confinement. "The warrant," (says Lord Coke, 2 Inst. 52,) "containing a lawful cause, ought to have a lawful conclusion." This is repeated by Lord Hale and all the text writers; and it is well established by numerous *authorities. Lord Chief Justice HOLT asserted this [*408 principle in *Bracy's Case*, 1 Ld. Ray. 99; (*a*) so did Lord ELLENBOROUGH in *Ex parte Goff*, 3 M. & S. 203; the whole Court, in Lord TENTERDEN'S time, in *Groome* v. *Forester*, 5 M. & S. 314; and the Court of Exchequer in *Daniell* v. *Philips*, 1 Cro. M. & R. 662; S. C. 5 Tyr. 293. In the last mentioned case PARKE, B., 1 Cro. M. & R. 673, expresses himself in the very words of Chief Justice HOLT: "The cause of commitment ought to be certainly stated, to the end that the party may know for what he suffers, and how he may regain his liberty." The learned Baron proceeds: "And if it be not, it is not only a ground for discharging the party, but the warrant is void, and no justification in an action of false imprisonment." He adds the following sentence, after citing *Groome* v. *Forester*, "contrary to the dictum of Lord HOLT in *Bracy's Case*," Comb. 391. I must, however, here remark that *Groome* v. *Forester*, far from professing to overrule any opinion of HOLT, proceeds on the authority of his decision in *Bracy's Case*, taking no notice of this supposed dictum or of the inaccurate reporter on whose single statement it rests; a dictum unnecessary to the decision, and plainly repugnant to it on principle, as well as to HOLT'S known opinion. It is mentioned by Comberbach that an action had been talked of: and we may well suppose that HOLT would be desirous of discouraging so vexatious a proceeding for a mere slip in the officer, and that his language was misconstrued into an opinion that no action could be maintained.

From this ancient and indisputable principle it follows *that a [*409 bad warrant cannot be eked out by the more regular and formal conviction; or rather, indeed, it is the same principle. It required no authority: but there is a decision on the very point in 2 Bingham in the case of *Wickes* v. *Clutterbuck*, 2 Bing. 483. *Goff's Case*, 3 M. & S. 203, does not appear to me inconsistent; for there Lord ELLENBOROUGH distinctly lays down this principle: "If there was any uncertainty on the face of the commitment I should have agreed with the argument. But coupling the premises with the conclusion, is it not in effect the same as if the warrant had directed the gaoler to detain the party until he had accounted? We must read the warrant as if the magistrates had in the conclusion recited over again the adjudication." LE BLANC, J., observed: "When the party has accounted and paid over the money, he will be entitled to be discharged by due course of law." That is, the warrant itself both indicates a conclusion of the imprisonment, the party's discharge by due course of law, which, though vicious as too

(*a*) S. C. Comb. 390. 5 Mod. 308, (*Bracey* v. *Harris*.)

general if it stood alone, receives an explanation from the other words in the same warrant, and shows that his accounting in conformity to his duty is the means of such discharge. But the warrant before us has no conclusion whatever: and, even if it justified the arrest (which is questioned on other grounds), cannot justify any of the ulterior proceedings against the plaintiff.

I apprehend that the goodness of a warrant in respect of its contents is wholly independent of the authority from which it proceeds. However dignified and powerful the body which sends forth process, that *410] process *must be consistent with itself and with the law, in order to defend the officer who acts upon it. There is no disrespect to the high Assembly with which this matter originated in applying the same rules of construction to the instruments by which it acts as to those that may be issued by an ordinary justice of the peace. It is impossible to make this distinction. The magistrate is as absolute, while exercising his jurisdiction, as an act of parliament can make him. A recent act(a) has, in certain cases, permitted him to avail himself of a good conviction where a commitment would otherwise have been imperfect: but that act proves what the common law was, and has no application to the present case.

There is a general averment, in the plea, that the acts complained of were done in accordance with the ancient usages and principles of the House, and the law and custom of Parliament. And the plaintiff is said to have admitted this as a fact by demurring. But I am of opinion that this would give too extensive an effect to admissions by demurrer, which ought to be rigidly confined to what the rules of construction require, especially when the averment is ambiguous and the fact is not peculiarly within the knowledge of the party. The averment here will be satisfied by being interpreted with reference to the mere issuing of the warrant. We cannot suppose, either that the defendant claims for the House of Commons the privilege of issuing a bad warrant, or that the party questioning the conduct of its officer admits such privilege, still less that the officer should exceed the limits of the authority which the warrant purports to vest in him.

*411] The point lastly stated for argument, on behalf of the *defendant is that the Speaker's warrant issued in a case where the House of Commons had jurisdiction, and the Courts of common law have no right or power to inquire into the formal mode in which they have proceeded. But the answer is, that we are inquiring, not how the House proceeded, but how the officer acted. The view that I take steers clear of all collision with any privilege of the House, except that large and general one to which I first adverted, and renders it unnecessary to consider the other objections to the plea. And, though the objections to this warrant may at first sight appear of a technical nature, they will be

(a) Stat. 7 & 8 G. 4, c. 30, s. 39.

found, on consideration, to involve principles of vital importance to the liberty of the subject. Judgment for the plaintiff.

In the Exchequer Chamber.

(Error from the Queen's Bench.)

Sir WILLIAM GOSSET *v.* HOWARD.

For marginal note, see pp. 359, 360, antè.

DAMAGES having been assessed (May 27th, 1845) at 200*l.* over and above costs, &c., and judgment signed, in the above case, the defendant below brought a writ of error in the Exchequer Chamber, assigning error in the common form. Joinder. The writ of error was argued in Trinity Vacation(*a*) and Michaelmas Vacation,(*b*) 1846.

*Sir *F. Thesiger*, Attorney General, for the plaintiff in error (defendant below,) after comparing and observing upon the several judgments delivered in the Queen's Bench, argued, as to the case itself, as follows. [*412

First: The act in question appearing to have been done by order of the House of Commons, that order is a complete justification to the officer, and a perfect answer to the action. This point, though it could not be urged in the Queen's Bench, may be argued before this Court, which has not yet had it under consideration. (The argument on this subject is omitted, the Court of Error not having given any decision on the point. The authorities cited were for the most part the same as those collected in *Stockdale* v. *Hansard*, 9 A. & E. 1; the only additional ones being stat. 3 & 4 Vict. c. 9, s. 1 (recital); Co. Litt. 127 *b*, and note (1) to *Foxwist* v. *Tremaine*, 2 Wms. Saund. 209, as to the form of pleading in *Jay* v. *Topham*,(*c*); *Verdon* v. *Deaele*, 2 Show. 300, and the pleadings in the same case as set out in Brownl. Ent. 129.(*d*)) [MAULE, J.

(*a*) June 13th and 15th. Before TINDAL, C. J., COLTMAN, MAULE and CRESSWELL, Js., and PARKE, ALDERSON and ROLFE, Bs.

(*b*) November 30th and December 1st. Before COLTMAN, MAULE and CRESSWELL, Js., and PARKE, ALDERSON and ROLFE, Bs.

(*c*) 14 East, 102, note (*a*) to *Burdett* v. *Abbot*.

(*d*) ALDERSON, B. asked, with reference to this head of the argument, whether the order of the House would be conclusive if they directed that a person should be put to death. The Attorney General answered, that he should decline arguing upon any extreme and extravagant case. [ALDERSON, B. It may not be necessary for you, because the course of precedent which you rely upon may have extended as far as the case of contempt, though not farther; not, for instance, to the turning a man out of his freehold.] The supposition of an extreme abuse might be urged against the jurisdiction, however undeniable, of any court. [ALDERSON, B. There is a difference between abusing known powers and assuming unknown ones.] If a House of Parliament assumed such powers, the question raised would be a constitutional, not a legal one. There is no legal redress against the House, more than against the Sovereign herself, if she inflicted a personal injury. [ALDERSON, B. But it does not follow that if an officer were employed, the officer of the Sovereign or of the House would be protected. Your best answer is, that the authorities do extend to the case for which you require them, and you do not want more. TINDAL, C. J. That is your best answer.]

*413] *You contend that the order, even if there had been no warrant, would have been a justification.] It would. In former times no warrant would have been issued;(*a*) and here none would have been necessary, if the House had not directed the Speaker to issue one. Then,

Secondly: The warrant, at all events, was a justification, having issued by order of the House; for the officer is bound to execute all orders and warrants of the House where no defect of jurisdiction appears on the face of them; and here no such defect appears, and the warrant is alleged in the pleas to have been issued according to the usages and privileges of the House and the law and custom of Parliament, which fact is admitted by the demurrer. And the Court cannot go into any further inquiry. This position rests upon the same authorities as those cited under the first head of the argument.

Thirdly: Assuming that the authority is to be inquired into, the proceedings of the House in this case were in pursuance of its ancient usages and privileges, and agreeable to the law and custom of Parliament. On the judgments delivered in the Court below it is perhaps left doubtful whether this is admitted by the demurrer, at least to the extent of acknowledging that the warrant itself was framed according to those privileges, and to that law and custom. But it is clear upon authority that the powers claimed by the several pleas are inherent in the House, and essential to the proper discharge of its functions: and, up to the

*414] *issuing of a warrant, this is admitted in the judgments of Lord DENMAN, C. J., and COLERIDGE, J.,(*a*) in the Court below. The authority of the Commons, as "the general inquisitors of the realm," to set on foot examinations, is asserted in 4 Inst. 11, 24. In *Burdett* v. *Abbot*, 14 East, 1, 138, Lord ELLENBOROUGH, speaking of the House of Commons, says that, "independently" "of any precedents or recognised practice on the subject, such a body must à priori be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be." In *Stockdale* v. *Hansard*, 9 A. & E. 115, Lord DENMAN, C. J., said: "The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt." LITTLEDALE, J., added, 9 A. & E. 168: "There is no doubt about the right as exercised by the two Houses of Parliament with regard to contempts or insults offered to the House, either within or without their walls; there is no doubt either as to the freedom of their members from arrest, or of their right to summon witnesses, to require the production of papers and records, and the right of printing

(*a*) See p. 370, note (*a*), antè.
(*b*) Antè, pp. 379, 380, 404.

documents for the use of the members of the constituent body; and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge." PATTESON, J., 9 A. & E. pp. 209, 210, 213, recognised the right of the *House to protect itself by summary proceedings against obstruction, and said also (in answer to an argument for the defendant): "The House is armed with ample powers to send for all persons who can give them information either before a committee, or at the bar of the House." [*415

Fourthly: If the House of Commons was acting in the regular course and exercise of its constitutional functions, the question remains, whether the proceeding by which the House carried out its object was regular and formal or not. But, on the assumption now made as to jurisdiction, the Court of Queen's Bench could not inquire whether the warrant was in such a form as this Court might deem valid. Some observations of the learned Judges on this point in *Howard* v. *Gosset*,(a) are at variance with many authorities, from *The Case of the Earl of Shaftesbury*, 6 How. St. Tr. 1269, downwards. COLERIDGE, J.,(b) after noticing the argument "that, with regard to the transcendent powers of the House, and its identity with the people at large, and out of respect to its great dignity, the warrants which it issues are not to be dealt with as those which proceed from tribunals co-ordinate with ourselves, or inferior," said: "I cannot admit that the degree of strictness in which formal accuracy is to be required in warrants has been measured, or ought to be, by the dignity of the courts from which they issue. Experience has shown that the liberty of the subject, with which we are entrusted, is involved in the accuracy in point of form of legal proceedings. For that reason accuracy is required: and in that view of it, it is no paradox to say that form *becomes substance. The more powerful, therefore, the source, and the higher in point of rank, the more strictness ought we to show, the more accuracy may reasonably be required. From the wide extent of jurisdiction, indeed, in the one case, and its narrowness in the other, a different rule of intendment exists: but, with this qualification, the rule is as I have stated." "It is trifling with language to speak of the present warrant as defective in form only. If the House cannot arrest of its own mere pleasure and without cause, to omit to state any cause, and to rely on its mere pleasure, is to proceed with one essential of the jurisdiction absent." And Lord DENMAN, C. J., said:(c) "I apprehend that the goodness of a warrant in respect of its contents is wholly independent of the authority from which it proceeds. However dignified and powerful the body which sends forth process, that process must be consistent with itself and with the law, in order to defend the officer who acts upon it. There is no disrespect to the high Assembly with which this matter originated in applying the same rules of construction to the instruments by which it acts as to those that may be issued [*416

(a) Antè, p. 359. (b) Antè, pp. 380, 381. (c) Antè, p. 409.

by an ordinary justice of the peace." His Lordship also(a) cited the dictum that "the cause of commitment ought to be certainly stated, to the end that the party may know for what he suffers, and how he may regain his liberty." But the Court of Queen's Bench itself, very lately, in the *Case of the Sheriff of Middlesex*, 11 A. & E. 273, held a warrant of commitment by the House of Commons for a contempt to be valid, though it did not show what the contempt was, and the term of imprisonment stated was only "during the *417] *pleasure of this House;" on which grounds the warrant of a justice of peace or of an inferior Court would have been deemed void; *Rex* v. *James*, 5 B. & Ald. 894; *Ex parte Besset*, 6 Q. B. 481. WILLIAMS, J., in the present case, viewed this point correctly, and relied upon *The Case of the Sheriff of Middlesex*. (The Attorney General here read the judgment of WILLIAMS, J., in *Howard* v. *Gosset*, antè, pp. 396—398, from "And before I proceed," to "*Burdett* v. *Abbot*.") That the Speaker's warrant can be treated like that of a justice of the peace or an inferior Court is a position unsupported by any authority. An opposite doctrine is stated in 3 Hawk. P. C. 219, B. 2, c. 15, s. 73 (7th ed.): "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses" (of parliament), "and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of parliament, and the rules of law and justice." Whereas the books abound with authorities showing that, in the case of inferior jurisdictions, an opposite presumption takes place if the legality be not made apparent. That the House of Commons is a distinct Court of judicature is laid down in 4 Inst. 23, 28; and, in the judgments of Lord ELLENBOROUGH and BAYLEY, J., in *Burdett* v. *Abbot*, 14 East, 138, 152, 153, 159, 160 (assented to by Lord DENMAN, C. J., in *Stockdale* v. *Hansard*, 9 A. & E. 130), it is placed at least on the level of the superior Courts. So, in *Burdett* v. *Abbot*, 5 Dow. 199, in the House of Lords (referred to in the present case by WILLIAMS, J.), Lord *419] Eldon *plainly compared the House of Commons to a superior Court of Westminster Hall, when he inquired of the Judges: "Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally, without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of habeas corpus, the return setting forth the warrant, stating such adjudication of contempt generally; whether in that case the Court of King's Bench would discharge the prisoner, because the particular facts and circumstances, out of which the contempt arose were not set forth in the warrant?" to which the Judges unanimously answered that the Court of King's Bench

(a) Antè, p. 408.

would not liberate. Of the credit given by the Courts to warrants of the Houses of parliament a strong instance appears in the *Case of the Earl of Shaftesbury*, 6 How. St. Tr. 1296, where the question turned on a commitment by the House of Lords, during His Majesty's pleasure and the pleasure of the House; and Sir T. JONES, J., said "such a commitment by an ordinary Court of Justice, would have been ill and uncertain;" but the Earl was remanded. In *Regina* v. *Paty*, 2 Ld. Ray. 1105, where a commitment by the Speaker's warrant was objected to, but the prisoner was remanded, GOULD, J., said:(*a*) "If this had been a return of a commitment by an inferior court, it had been naught, because it did not set out a sufficient cause of commitment: but this return being of a commitment by the House of Commons, which is superior to this Court, it is not *reversible for form." POWYS, J.,(*b*) observed: "The second objection was, that the warrant was not under seal." "But to this I answer, that the House of Commons is a Court;" "and commitments by a court need not be under hand and seal. And besides, the consuetudo parliamenti will justify this commitment." "Fifthly, it is objected, that the commitment is, during the pleasure of the House of Commons, whereas it ought to be, till they shall be discharged by due course of law. To this I answer, that this commitment is more favourable for the prisoner." "Besides, this is agreeable to the constant forms of commitments by the House of Commons; and it is agreeable to our commitments here, which are implied to be during the pleasure of the Court. And though the House of Commons express that in their commitments, yet that is only expressing what we imply." "If all commitments for contempts, even those by this Court, should come to be scanned, they would not hold water. Our warrants here in such cases are short, as for a contempt, or for a contempt in such a cause. So in chancery the commitments for contempts are for a contempt in not fully answering, &c., and would not this commitment be sufficient?" "The House of Commons is a great Court, and all things done by them are to be intended to have been ritè acta, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of Court of two lines, and such commitments are held good, because it is to be intended, that we understand what we do." And POWELL, J.,(*c*) as to the objection that the warrant was to detain during pleasure, *answered that that "was the constant form of warrants by the House." DE GREY, C. J., in *Brass Crossby's Case*, 3 Wils. 188, 199, when arguing that the Court of Common Pleas cannot take cognisance of a commitment by the House of Commons, said: "The rule is, that the Court of remedy must judge by the same as the Court which commits: now this Court cannot take cognisance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to

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(*a*) 2 Ld. Ray. 1106. (*b*) Ib. 1107. (*c*) Ib. 1111.

us. If the Court of Common Pleas should commit a person for a contempt, the Court of King's Bench would not inquire into the legality or particular cause of commitment, if a contempt was returned; yet in some cases the Court of King's Bench is a court of inquiry, but in this case is only co-ordinate with this Court." And BLACKSTONE, J., observed: "Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House, and their execution, are according to law." So in *Rex* v. *Hobhouse*, 2 Chitt. Rep. 207, 210, this Court said: "The House of Commons have adjudged (as appears by the warrant) that the gentleman on the floor has been guilty of a contempt, in having published a seditious libel." "We cannot inquire into the form of the commitment, even supposing it is open to objection on the ground of informality." Therefore it is incorrect to say that a warrant of the House of Commons is examinable with the same strictness as a commitment by an inferior Court: the true rule is,

*421] that it must be dealt with as *the Court would treat the proceeding of a superior Court having co-ordinate jurisdiction. Then the well known distinction applies, that, when parties claim or justify under a Court of inferior rank or limited power, the circumstances giving the jurisdiction must be shown, but not where the authority is derived from a superior Court: note (1) to *Peacock* v. *Bell*, 1 Wms. Saund. 74 *a*; *Taylor* v. *Clemson*, 2 Q. B. 978, 1031, judgment of the Court; *Harrison* v. *Wright*, 13 M. & W. 816, 818; Com. Dig. *Pleader* (3 M, 24.).

The Courts at Westminster have always claimed to arrest without using such formality as is required in warrants issued by justices of the peace. In *Throgmorton* v. *Allen*,(*a*) cited in *Mayhew* v. *Locke*, 7 Taunt. 63, 66, it was held that the Marshal of the King's Bench might justify under the order of the Chief Justice, given by word of mouth, to arrest and have the plaintiff before him, to answer, &c. [ALDERSON, B. In the case of an order by a judge for executing sentence of death, there is no warrant.(*b*) PARKE, B. That is because there is a record. The reason appears from 2 Hale's P. C. 409, c. 57.] In *Watson* v. *Bodell*, 14 M. & W. 57, 70, which was an action of trespass against the messenger of a Court of Bankruptcy for detaining the plaintiff in custody till he paid costs in pursuance of an order given by the Commissioner but not under seal, PARKE, B., delivering the judgment of the Court, said that, if, in the particular case, a warrant was required, it ought to have been under the Commissioner's hand and seal: but he added: "It is clear that a

*422] court of record may commit by order to the custody of its *officer in open Court, as the Queen's Bench or Quarter Sessions, for there is, or ought to be, a record of such commitment; and the order given sedente curiâ by the Court in this case would probably be a pro-

(*a*) 2 Roll. Abr. 558, tit. *Trespass* (C), pl. 2.
(*b*) See *Rex.* v. *Antrobus*, 2 A. & E. 788, 808.

tection to the officer." Hawkins (Vol. 3, p. 199, B. 2, c. 15, s. 37), in explaining the words "taken" "by commandment of the king, or of his Justices," in stat. 3 Ed. 1, c. 15 (Westm. 1), observes that "by commandment" "of his Justices" cannot be understood as relating to persons imprisoned only for safe custody, "and therefore it seems, that they must be taken in a more restrained sense of those only who are imprisoned by the absolute command of such justices by way of punishment, as for a misdemeanour done in their presence, or for other contempts, or such like matters, which lie rather in their discretion than in their ordinary power; and it seems that a commitment by the Chief Justice, without showing any cause whatsoever, shall be intended to be for some such matter." It appears, indeed, to have been the practice of this Court, in some cases, to issue attachments for contempt without a rule to show cause; *Rex* v. *Jones*, 1 Stra. 185; *Anonymous* case in Salkeld (1 Salk. 84). And, in *Saunders* v. *Melhuish*, 6 Mod. 73, a party charged on affidavit with committing a fraud under colour of proceedings in ejectment was at once committed to answer interrogatories; HOLT, C. J., saying: "When one is put to answer interrogatories for a fact fully proved against him, he ought to answer in custody; but where it is anything doubtful, the course is to put him to answer, that is, to bind him by recognisance to answer." In 3 Hawk. P. C. 221, B. 2, c. 15, s. 76, reference is made to the *controversy between the Court of King's Bench, in the time of Lord Coke, and the Court of Chancery, when several persons committed by the Court of Chancery were bailed by this Court, "upon exceptions to the generality of the form of the commitments, as not showing the time of the commitment, or setting forth only the command of the Lord Chancellor as the ground of the imprisonment without mentioning any crime at all, or mentioning the crime in general terms, as for a contempt to the Court of Chancery without showing what the contempt was, or at what time committed;" and Hawkins, after noticing particularly the case of one Glanvil, says that he has not met with any late precedent of this kind, expresses a doubt whether the authority of the former cases is not now lessened, and then adds: "However it cannot but be expected, that the superior courts will pay the highest regard to one another's proceedings, and be ready to presume, that they are agreeable to law, unless the contrary appear, or the case be very particular and extraordinary:" and he observes, as to the particular case of relief given by Chancery against the unequitable use of a judgment: "Whenever it stands indifferent whether the matter examined by Chancery after a judgment at law, be of such a nature as is proper for relief in Chancery, or not, it is not probable that any other Court of Westminster Hall will easily presume that it is not, when the Chancellor, who is the proper judge, hath determined that it is: And agreeably hereto it hath been adjudged, that a commitment from Chancery for disobedience to a decree, is good, without showing what the decree was." In *Dicas* v. [*423

*424] *Lord Brougham*, 6 Car. & P. 249, the *warrant under which the plaintiff had been committed by the Lord Chancellor, sitting in bankruptcy, was clearly insufficient according to the tests which have been applied to other warrants of commitment; for it stated no cause, and ordered the plaintiff to be detained "until my further order:" yet Lord LYNDHURST, C. B., held that the judgment of the Lord Chancellor could not be questioned in an action against him for the commitment under such warrant; and also that there was no necessity for a special plea, but that the general issue was sufficient, as no action would lie; which latter proposition appears to be supported by *Bushell's Case*, 1 Mod. 119, and *Hamond* v. *Howell*, 1 Mod. 184. But against the Judge of an Ecclesiastical Court an action had been held maintainable for excommunicating without jurisdiction; *Beaurain* v. *Sir W. Scott*, 3 Camp. 388. The known forms of attachment in the Queen's Bench, Exchequer and Common Pleas contain nothing to show that the proceeding relates to a matter cognisable by the particular Court: but it is presumed in favour of those Courts. The form in the Common Pleas, as given in Tidd's Practical Forms, p. 348 (8th ed.), is: "Attach C. D. so that you may have his body before," &c., "to answer us, of and concerning such things as on our behalf shall be then and there objected against him." There is, indeed, on these attachments, an indorsement of the name of the cause in which the process issues; but that shows nothing as to jurisdiction. The form of attachment in the Court of Chancery (given in 2 Smith's Chancery Practice, 653, 3d ed.) is also quite inconclusive as to the matters giving jurisdiction. [ROLFE, B. What form was used

*425] *in *Mr. Lechmere Charlton's Case*, 2 Mylne & C. 316, 343?] The warrant there was more full, and recited a very special order; such an order was made also in *Mr. Long Wellesley's Case*, 2 Rus. & M. 639, with a formal adjudication; but a less complete one (merely ordering that the party "do stand committed," &c. "for his contempt of this Court in writing," &c., a paper recited in the order) was held sufficient in *Ex parte Van Sandau*, 1 Phillips, 445, 446, 605, on comparison of the forms in Mr. Charlton's and Mr. Wellesley's cases with earlier precedents. [ALDERSON, B. No doubt a Court may judge of its own orders or warrants. The House of Commons, if they thought a warrant of the Speaker insufficient, might liberate on that ground.] In *Ex parte Van Sandau*, a question turned on the necessity of an adjudication that contempt had been committed. But that has lately been held unnecessary, in *Cobbett's Case*, 7 Q. B. 187. [ALDERSON, B. That case came before all the Courts. PARKE, B. There can be no occasion to adjudge a contempt committed when the process of the Court itself has been disobeyed.] It appears to have been the opinion of a learned Judge in the Court below that the warrant should be circumstantial enough to acquaint the party arrested with the ground of proceeding, so that he may judge whether he will obey it or not. [TINDAL,

C. J. That would not apply to the attachment from the Common Pleas.] Nor to an arrest by merely sending the mace, as formerly practised by the House of Commons. [ALDERSON, B. It is the practice of the House of Lords now.] And it cannot be assumed, as was suggested in the Court below, that the officer would orally communicate the cause of arrest. That the latitude allowed to superior Courts as to the form of their process is not *granted to inferior ones, and that these are strictly required to show their jurisdiction, appears from many authorities, among which are *Rex* v. *Fowler*, 1 Salk. 293; *Rex* v. *Eyre*, 2 Stra. 1066; *Rex* v. *Dugger*, 5 B. & Ald. 791 (recognised as an authority in *Regina* v. *Thorogood*, 12 A. & E. 183, 198): the point is also explained by the case *In the matter of Clarke*, 2 Q. B. 619. Therefore it was incorrectly assumed in the Court below that no difference existed in this respect between superior and inferior jurisdictions. Then, if this Court recognises the procedure of the House of Commons as one superior Court recognises that of another,(a) the case comes, [*426

Fourthly, to a mere question on the form of warrant adopted by the House; but that is, in other words, a question on the practice of the House: and no Court will interfere with the practice of another. Each Court has the power of settling its own practice. "The course of the Court is the law of the Court," Com. Dig. *Courts* (Q). In *Burdett* v. *Abbott*, 14 East, 63, Mr. *Holroyd* said, in argument: "Suppose a party was arrested upon a void writ out of C. B. as if a writ tested in one term were not returnable till the second term, which has been held to be a void writ; if he sued his writ of habeas corpus returnable in this Court instead of in C. B., this Court would not discharge him, but would refer him to the Court out of which the writ issued." Lord ELLENBOROUGH answered: "Without touching the question of contempt, I should rather think, that if a person arrested *on a process absolutely void upon the face of it, claimed his discharge of us, we should discharge him, whether it were on Exchequer or Common Pleas process. As suppose the defect in the process were in a matter required by positive statute, of which all the Courts must take cognisance. If indeed it were a doubtful matter, which might involve any question as to the practice of another Court, we should send him to that Court." *Ex parte Smyth*, in the Court of King's Bench, 3 A. & E. 719, 724, and Court of Exchequer, 2 Cro. M. & R. 748, S. C. Tyr. & G. 222, is a direct authority on this point. [*427

Fifthly, the question, as raised by COLERIDGE, J., on the validity, or by WIGHTMAN, J., on the sufficiency, of the particular warrant, as appearing from the contents of warrant itself, is disposed of by the preceding argument. The demurrer admits that it was issued duly by the proper person. POWYS, J., in *Regina* v. *Paty*, 2 Ld. Ray. 1108, already referred to, says that things done by the House of Commons

(a) PARKE, B., referred to *Lake* v. *King*, 1 Saund. 131, as showing that the Court of King's Bench will notice the order and course of proceedings in Parliament.

will be presumed ritè acta, without special recital, "by the same reason as we commit people by a rule of Court of two lines, and such commitments are held good, because it is to be intended, that we understand what we do." A like intendment must be made in favour of a warrant drawn up by the Speaker of the House of Commons; he must be taken to understand the practice, and will not be presumed to have issued a warrant in an unusual form. But, even construing this document as if it had issued from an inferior Court, it is sufficient, for it recites that the House "had that day ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms attending the said
*428] House;" *and, connecting that recital with the subsequent part, which "did require and authorise the Serjeant at Arms then attending the said House of Commons to take into custody the body of the plaintiff," it is obvious that the words "take into custody" must be understood in the sense which would make it a fulfilment of the recited order that he should "be sent for;" and must therefore imply that he was to be brought before the House. *Coster* v. *Wilson*, 3 M. & W. 411, shows that the recital may be so coupled with the mandatory part. *Ex parte Goff*, 3 M. & S. 203, is to the same effect, and is recognised in *Daniell* v. *Philipps*, 1 Cro. M. & R. 662, 673; S. C. 5 Tyr. 293, 306. [ALDERSON, B., mentioned *Ex parte Foulkes*, 15 M. & W. 612.]

Petersdorff, contrà. No question of privilege legitimately arises in this case. The House of Commons is not directly a party, but becomes so incidentally; and the real question is, whether a warrant at variance with the practice of Courts generally, and with established principle, can be sustained merely because it issued from the House of Commons. It is unnecessary to deny that they, like other superior Courts, may commit for contempt, though the power of either House in this respect has been to some extent called in question by Mr. Hargrave in his Juridical Arguments.(*a*) But the power is at any rate of a peculiar nature, subject to limitations, dependent on circumstances, and founded on the necessity of self-protection common to all Courts. This is discussed in
*429] the judgment drawn up by *WILMOT, J., in *Rex* v. *Almon*;(*b*) and the power, as exercised by the House of Commons, is vindicated on the ground of necessary self-protection by Lord ELLENBOROUGH in *Burdett* v. *Abbot*, 14 East, 151, 152. For that necessary purpose, the House, or Court, exercising the authority, must themselves judge what is a contempt; great latitude has been allowed in the form of their commitments; but, if they commit, an adjudication must appear on their proceeding.(*c*) In the *Case of the Earl of Shaftesbury*, 6 How. St. Tr. 1269, S. C. 1 Mod. 144, *Murray's Case*, 1 Wils. 299, *Rex* v. *Flower*, 8 T. R. 314, *Regina* v. *Paty*, 2 Ld. Ray. 1105, *Brass Crosby's Case*, 3

(*a*) *Case of Mr. Perry's commitment*, 2 Harg. Jur. Arg. 183.

(*b*) Wilmot's Notes of Opinions, &c., p. 254, et seq.

(*c*) *Kelly*, in the argument below, cited *Green* v. *Elgie*, 5 Q. B. 99, as to the necessity of an adjudication in form.

Wils. 188, and the *Case of the Sheriff of Middlesex*, 11 A. & E. 273, in which the commitments were upheld, adjudications of contempt appeared. It may further be admitted that the House of Commons has a general inquisitorial power; but the question arising here is, what means they are authorised in using to obtain evidence.

The first head of argument for the plaintiff in error is, that, the act of trespass appearing to have been done by order of the House of Commons, no further defence is necessary. But the issuing of this warrant is a judicial act; for it is not done in the exercise of legislative or inquisitorial powers; and, if so, the proceeding is clearly cognisable here or by the Court of Queen's Bench; for it is well established that a superior Court may inquire into the legality of process issuing from another Court, whether of limited or of general jurisdiction: *Case of *the Marshalsea*, 10 Rep. 68 *b*; *Prigg* v. *Adams*, 2 Salk. 674; [*430 *Bryant* v. *Clutton*, 1 M. & W. 408; S. C. Tyr. & G. 843; *Barker* v. *Braham*, 3 Wils. 368. [TINDAL, C. J. There the ca. sa. from the Queen's Bench had been set aside before the action was brought in the Common Pleas.] If the general rule be that process of a superior Court may be questioned in a Court of co-ordinate jurisdiction, the House of Commons has no privilege exempting it from such inquiry. (He then proceeded to discuss this point. The argument is omitted for the reason before given; p. 412. He cited Hargrave's Preface to Hale on the Jurisdiction of the Lords' House, p. cxxxv., et seq.; note to *Ashby* v. *White*, in Mr. Gale's ed. of *Ld. Raymond*, p. 527 et seq.; *Coundell* v. *John*, 2 Salk. 504; and other authorities, all of which are cited in *Stockdale* v. *Hansard*, 9 A. & E. 1, or before mentioned in this report.) At least, if the warrant of the House were illegal on the face of it, a court of law might notice the invalidity: as, if they had ordered a man to be transported for a contempt. [ALDERSON, B. It does not appear by any authority that the house of Commons ever has transported. They have been accustomed to commit; and there may be a great difference between questioning their exercise of a new power and examining the grounds on which they have exercised an old one.] Lord KENYON observed, in *Rex* v. *Wright*, 8 Tr. 293, 296: "I do not say that cases may not be put in which we would not(*a*) inquire whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their Serjeant at Arms to arrest a counsel here who was arguing *a case between two individuals, or to grant an in- [*431 junction to stay the proceedings here in a common action, undoubtedly we should pay no attention to it." In all applications to discharge from custody under warrants of the House of Commons, the courts have looked into the document; and, if it professed to state any ground of proceeding, they have not scrupled to examine it.

The objection, therefore, is open, that this warrant, on the face of it,

(*a*) Sic.

does not authorise the arrest. The defendant has placed the warrant on the record as containing in itself the ground of his justification, according to the rule, that, "In trespass, when the defendant justifies under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his plea. For it is not sufficient to allege generally that he committed the act complained of by virtue of a certain writ or other warrant directed to him; but he must set it forth specially:" note (1) to *Green* v. *Jones*, 1 Wms. Saund. 298. Now the warrant here stated is contrary to the provision of Magna Charta (stat. 9 H. 3, c. 29), that "No freeman shall be taken, or imprisoned," "but by lawful judgment of his peers, or by the law of the land," which implies, according to Lord Coke, 2 Inst. 52, that a commitment must be "by due process" "of law, and according to the law of the land;" to fulfil which condition, according to the same authority, "the cause must be contained in the warrant," p. 52: and the same doctrine is laid down in p. 591. The necessity of stating the cause is enforced also in Bla. Com. vol. i. p. 137, and in vol. iii. p. 133, where the author says that "the glory of the
*432] English law *consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the Court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner." To the same effect are, 2 Hale's P. C. 111, 122; Lamb. Eirenarch. 87, B. 2, c. 2, and *Dr. Groenvelt's Case*, 1 Ld. Ray. 213; and the doctrine is supported by the opinion of HOLT, C. J., in *Kendal's Case*, 5 Mod. 78, 85. The objection of uncertainty, which prevailed in *Money* v. *Leach*, 1 W. Bla. 555, is of the same nature as that now taken; and there, usage, though long continued, was held to be no answer. The necessity of describing the offence, not as particularly as in an indictment, but so far as to show an authority to imprison,(*a*) is insisted upon by BEST, C. J., in *Wickes* v. *Clutterbuck*, 2 Bing. 491, 2: and the judgments of this Court in *Caudle* v. *Seymour*, 1 Q. B. 889, are strong on the same point. Imprisonment and detainer without any cause shown are a subject of complaint in sect. 5 of the Petition of right, 3 C. 1: and an act of the Scottish Parliament, A. D. 1701, expressly provides that no person shall be imprisoned for custody in order to trial without a written warrant "expressing the particular cause for which he is imprisoned."(*b*) If there be any distinction
*433] between a warrant to commit and a warrant *to apprehend, the latter ought to be the more carefully guarded, because such a warrant is more likely to meet with resistance. [PARKE, B. What speci-

(*a*) *Kelly*, in the Court below, admitted that it might not be necessary to show an offence, but contended that a cause at least must appear.

(*b*) Acts of the Parliaments of Scotland, vol. 10, p. 272.

fication of cause is there in a capias ad respondendum ?] That is merely civil process. [PARKE, B. You say that any process for the purpose of arresting must state a cause. The capias does not even recite the writ on which it is founded.] It shows that the party is arrested at the suit of A. B. in an action of debt, or on promises. [ALDERSON, B. It shows the motive of the Court for taking, but not the cause of the taking.] The party taken knows from the process what he has to answer. [ALDERSON, B. Does the capias under stat. 1 & 2 Vict. c. 110, s. 3, state that there is cause for believing that the defendant is about to quit England ?] No case in which a form is given by statute can affect the general rule. And in the statutory form the capias recites an action pending. [PARKE, B. It is not recited, though the fact is to be inferred from the practice of the Court. If you scan the capias as accurately as you would a justice's warrant, you do not find that there is a pending plea. [ALDERSON, B. And, if you infer that fact from the process of the Court, must not you give the same credit to the process of one Court of superior jurisdiction as to that of another ?] It may be admitted, consistently with the argument, that a distinction may exist between the process of a superior and that of an inferior Court. [ALDERSON, B. Then are we to construe the warrant of the House of Commons as process of a superior or of an inferior Court ? According to the language of the Court of Common Pleas in *Brass Crosby's Case*, 3 Wils. 199, 204, it must be *treated as process of a superior Court.] That may be admitted: but still, according to the authorities, it ought to show, first, a [*434 lawful cause of arrest; secondly, a jurisdiction, not only over the subject matter but over the person; and, thirdly, a time when, or an event on which, the imprisonment shall determine: and, fourthly, like every other warrant, it ought to have a proper conclusion. The instrument in question has none of these requisites. Such a document, if returned to a habeas corpus, would not enable the Court to judge whether the imprisonment was lawful or not. If there have been one or two instances in which the House has issued warrants as vague, they are clearly irregular, and can only have the effect of weakening any argument that might be drawn from uniformity of practice. As to the forms of attachment; those against the sheriff, in the Queen's Bench and Exchequer(*a*), do state a cause; and, in the case of attachment against a party for not paying costs, there is a special indorsement, "for nonpayment of costs, taxed," &c., at so much, "pursuant to a rule of Court." Attachments for contempt of the Court of Chancery recite a contempt, and state that the party is to answer that charge, and to abide the order of the Court; 1 Daniell's Chanc. Pract. 428, 2d ed. The form in the Common Pleas, which has been relied upon, is more general; but it does inform the party what he is called upon to do; and an indorsement is always added, which renders the information complete. And, further, the particular

(*a*) See Tidd's Pract. Forms, 115, 116, 8th ed.

form cited is one known and used in the Court for a long series of years, and is addressed to the sheriff, as an officer of the Court. Possibly, too, *435] even this form, *according to the doctrine of *Money* v. *Leach*, 1 W. Bla. 555, might not be held good on the ground of long usage, if it were now called in question. [ALDERSON, B. The usage there was that of a particular person, the Secretary of State for the time being. The practice of a Court is the usage of the country, the common law. The usage of the Lord Mayor would be quite a different thing. *Money* v. *Leach* does not meet the question whether general warrants issued by a Court according to its immemorial usage would or would not be good. Supposing it could be shown that the House of Commons had, from time immemorial, issued warrants like this, do you say they would still be invalid?] At least this warrant is without parallel in the practice of other Courts. As to the Lord Chancellor's warrant in *Dicas* v. *Lord Brougham*, 6 Car. & P. 249, its validity may be doubted; on the trial, no question was raised upon its form.

It cannot be maintained that this proceeding is analogous to process for obtaining the attendance of witnesses. That is not compulsory in the first instance. There must be disobedience before an attachment issues. The superior Courts do not begin by sending for a witness in custody. But on this warrant it appears that the House of Commons does so. No usage has been shown which authorises them so to proceed. Nor, indeed, does it appear by the warrant that the party named is required to come and give evidence. [ALDERSON, B. That objection arises if you construe the warrant like that of a magistrate.] At any rate, a power is exercised which the superior Courts do not assume. *436] [ALDERSON, B. It is the daily practice to commit persons *in order that they may give evidence in criminal cases.] That is under stats. 1 & 2 P. & M. c. 13, s. 5, and 2 & 3 P. & M. c. 10, s. 2,(a) in case of felony; but the power is a limited one; the party committed is in the presence of the justice, and is, in a manner, in contempt, by not finding recognisances. [ALDERSON, B. How would that be in the case of a married woman?] A married woman refusing to find surety for her appearance at quarter sessions to give evidence in a case of felony may be committed; *Bennet* v. *Watson*, 3 M. & S. 1. In *Evans* v. *Rees*, 12 A. & E. 55, 57, 59, 60, where the plaintiff had been summoned to give evidence before a justice on a charge of assault, and, on his non-appearance, the justice issued his warrant for bringing the plaintiff before him to find bail to appear and give evidence at the assizes, this Court held the proceeding invalid. Lord DENMAN, C. J., intimated an opinion that the only ground on which a commitment could be maintainable would have been contempt; and LITTLEDALE, J., said "this warrant is clearly illegal, even if the magistrate had the power of compelling the attendance of the witness by warrant." Stat. 2 & 3 Vict. c. 71, s. 22, empowers a

(a) And see stat. 11 & 12 Vict. c. 42, s. 20.

police magistrate to issue his warrant for bringing a witness before him who has been served with summons and disobeys.(*a*) These acts, and stat. 6 G. 4, c. 16, s. 33, authorising commissioners of bankrupt to bring before them by warrant persons deemed capable of giving information as to the bankrupt or his estate, and not attending on summons, afford the only instances in which, even by statute, such a power can be exercised.

*A test which has been often applied to the validity of warrants is, what the consequence would be if resistance were made and the officer killed. In the *Countess of Rutland's Case*, 6 Rep. 52 *b*, 54 *a*, "it was resolved, that the sheriff, or any other by his authority, who makes an arrest of the person of another, ought on the arrest to show at whose suit it is; out of what Court, for what cause he makes it," &c. "If the officer be demanded he must show his warrant;" 1 Hale's P. C. 583; and, if the warrant be not lawful, as if the name of the bailiff, &c., be interlined after sealing, "if such bailiff be killed, it is but manslaughter, and not murder;" 1 Hale's P. C. 457. To the same effect are the case on the circuit of Northampton cited in the case *High Commission*, in 12 Rep. 49, and the dicta in *Burslem* v. *Fern*, 2 Wils. 47, 48, and *Housin* v. *Barrow*, 6 T. R. 122; and the doctrine of these is supported by *Hood's Case*, 1 Moo. Cro. C. 281. And on an indictment for murder it could not be contended that the warrant, because issued by the Speaker of the House of Commons, was not examinable. [*437

Then, if the warrant pleaded be bad, the other matters stated in the pleas cannot aid; they are only explanatory, and matter of inducement. It is not even stated that the acts complained of were done in obedience to the orders and resolution of the House. And in general, where a party justifies under a specific authority in law, if that authority fails, he cannot avail himself of proceedings anterior to the defective one. The justification here is, and must be, rested on the warrant itself. A sheriff, if he had executed an invalid *warrant, could not allege that it was founded upon a valid judgment. (The Attorney General said he admitted that the order of the House alone could not be a defence to the individual officer, but that he must rely upon the warrant.) [PARKE, B. Then, if the warrant is bad, the defence fails.] The pleas allege that the proceedings of the House were acoording to their usages and privileges and the law and custom of parliament; but they do not state that the warrant itself was so. [*438

Lastly, it is questionable whether the warrant, as set out, justifies the several acts complained of in the declaration. It recites an order that the plaintiff should be sent for in the custody of the Serjeant at Arms, and then requires the Serjeant at Arms "to take into custody the body of the plaintiff." That authorises a single act of arrest, not carrying

(*a*) And see, now, as to justices generally, stat. 11 & 12 Vict. c. 42, s. 16, and sched. (L 2), (L 3), (L. 4).

him from one room to another, imprisoning him, then compelling him to return, and imprisoning him again, which are several substantive trespasses, and not one trespass with aggravations. [CRESSWELL, J. You say that the warrant is an authority to take him, and not to fetch him. MAULE, J. Might not the officer move him an inch? For, in strictness, all the allegations might be satisfied by his having been moved an inch and then detained for another moment. Each moving would be a separate trespass.] The warrant should have directed the officer, not only to take, but to detain the plaintiff in custody, and to bring him, &c. On these pleadings it may as well be supposed that the plaintiff was twice detained for several hours as for several moments. [MAULE, J. That might have been matter for a replication. The plea itself states, in effect, that the defendant did no more than was *necessary to bring him before the House. ' ROLFE, B. Is not the warrant, in effect, an order to fetch? PARKE, B. You say it is only an order to take him, not to detain him one minute.]

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Sir *F. Thesiger*, Attorney General, in reply. As to the power of the Houses, generally, to commit for contempt, which has been questioned in some degree on the authority of Mr. Hargrave, that writer says, in vol. i. p. 3, of his Juridical Arguments:(*a*) "I understand it to be clearly part of the law and custom of parliament in England, that each House of parliament may inquire into and imprison for breaches of privilege:" and he goes on to cite instances. The argument and authorities for the plaintiff in error on the subject of privilege have not been answered. (The reply on this head is omitted. In addition to the authorities before mentioned, the Attorney General cited, as to the irresponsibility with which certain bodies and individuals, and among these the Judges, are invested, in the discharge of public functions, *Floyd* v. *Barker*, 12 Rep. 23; judgments of DE GREY, C. J., and BLACKSTONE, J., in *Miller* v. *Seare*, 2 W. Bl. 1141, 1145, 1147; *Garnett* v. *Ferrand*, 6 B. & C. 611, 625; judgment of HOLT, C. J., in *Groenvelt* v. *Burwell*, 1 Ld. Ray. 454, 468; judgment of Lord MANSFIELD in *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 172.)

The plaintiff in error relies upon the warrant, as that which alone can justify him individually in executing the order of the House. [MAULE, J. It might have been another question, if the House had merely *issued their order, whether the officer might not have justified under that at once, without stating a warrant.] That was the course taken in *Jay* v. *Topham*, 14 East, 102, note (*a*). Then as to the generality of this warrant. The words "per legem terræ," in Magna Charta, do not advance the argument for the defendant in error, because it is a question in each case what is the lex terræ applicable to the subject matter. The passages cited from Blackstone apply to warrants of commitment; and that in 3 Comm. 133, is too general in its assertion;

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(*a*) Opinion on the commitment of The Hon. Simon Butler and Mr. Oliver Bond.

it is contradicted, for instance, by the practice on attachments. The passages from Hale and Lambard, and the cases of *Wickes* v. *Clutterbuck*, 2 Bing. 483, and *Caudle* v. *Seymour*, 1 Q. B. 889, related to warrants of justices of the peace; and all these authorities, except the last, and 2 Hale's P. C. 111, relate to warrants of commitment. *Kendal's Case*, 5 Mod. 78, was that of a commitment by a secretary of state. It was argued that warrants to apprehend should be more strictly guarded than warrants of commitment: but Hale (2 P. C. 111) says that a warrant for apprehension, not containing the cause specially, is not therefore void, if de facto the matter be within the jurisdiction of the justice, and it be so averred. Such warrants are often issued on suspicion merely: and in case of felony the apprehension may be without any warrant. *Money* v. *Leach*, 1 W. Bl. 555, does not show that every warrant which may be termed general is void. And in *Rex* v. *Tubbs*, 2 Cowp. 512,(*a*) a warrant "to impress *seamen, sea-faring men, and persons whose occupations and callings were to work in vessels and boats upon rivers," was fully recognised as valid, on the grounds of usage and necessity. [ALDERSON, B. That was not properly a general warrant: it was a warrant against a particular class of persons, over whom the Crown had always had that power.] Still the recognition of it is inconsistent with the universal rule contended for on the other side. And the decision in *Money* v. *Leach* may be grounded on the distinction taken by ALDERSON, B., in the present case, between acts of an individual and acts of a Court. Committal for the purpose of giving evidence is a stronger application of the lex terræ than appears reconcileable with the argument on the other side. But all the authorities relating to warrants of magistrates become unimportant, when it is admitted that warrants of the House of Commons stand on the same footing as process of the superior Courts. (*Peteredorff* denied that he had meant to make any absolute admission to this effect.) The authorities before cited establish the point, and refute the doctrine, laid down in the Court of Queen's Bench, that warrants of the House of Commons are to be tried by the same rule of construction as those of a justice of peace, or rather that, in proportion as the Court is higher in rank, the construction ought to be more strict. [ALDERSON, B. The rule as to construction depends on the extent of jurisdiction rather than on the dignity of the Court. The jurisdiction of a justice of peace is limited, and contrary to the common law; and therefore it is necessary to see, on the face of his *proceeding, that he has not gone beyond his jurisdiction.] Primâ facie an inferior Court has not jurisdiction; a superior has; though there may be a superior court which has not jurisdiction over the whole kingdom. [PARKE, B., referred to *Peacock* v. *Bell*, 1 Saund. 73.] The distinction between a superior court and a court of limited and statutory juris-

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(*a*) See *Rex* v. *Watts*, 1 B. & Ad. 166, as to writs of assistance.

diction was discussed and recognised in *Harrison* v. *Wright*, 13 M. & W. 816, 818. And the opinion of COLERIDGE, J., in the present case, as to the necessity of setting forth a cause in the warrant of the House of Commons, is at variance with the language of the same learned Judge in *Stockdale* v. *Hansard*.(a)

Lord DENMAN, C. J., admits, in the present case, that the House may order a person to be brought before them for examination compulsorily, and without apprising him of the reason; because delay might, in some cases, wholly defeat the privilege of inquiry. But, according to the argument on the other side, if the House were inquiring into a treasonable conspiracy, and wished to secure the attendance of a witness who, on being informed of the object, would abscond, they might indeed issue a warrant to bring him before them, not stating the cause; but, on habeas corpus, the cause must be returned, and so the purposes of the investigation be defeated. [*Petersdorff*. It should at least appear by the warrant that the party was to attend for the purpose of being examined. PARKE, B. Do you say that a warrant so stating would be sufficient? *Petersdorff*. It would be free from one objection. But it *ought to show that the party will not come voluntarily, and therefore is to be brought before the House in custody. PARKE, B. Would it, then, be enough to say "Whereas it appears to the House that the witness will not come voluntarily, and therefore must be brought in custody?" *Petersdorff*. It would not, because they cannot send for him in custody in the first instance. It must appear by the warrant that he has already been sent for, and absconded or refused to attend, and so is in contempt.] That would be a circuitous mode of effecting the purpose, and very likely to defeat it. And in the judgment of COLERIDGE, J., it seems admitted that such a course was not nceessary.

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Supposing that the warrant here were process of the more usual kind issuing from one of the superior Courts of record, it is clear that, whether it were merely irregular, but not set aside, or were an excess of jurisdiction, no action would lie against the officer for executing it; unless indeed the proceeding had been taken under a mere statutory power, which had been exceeded. If a writ of right were brought by a subject in the Queen's Bench, the officer would not be liable for executing the process. That is the distinction between superior and inferior Courts: in the one the officer is bound to execute the process without inquiry, and, in doing so, has the same immunity as a judge of the Court: in the other, if he puts in force that which the Court has no authority to order, it is at his peril. *Riddell* v. *Pakeman*, 2 Cro. M. & R. 30, S. C. 5 Tyr. 721, is an instance of the exemption where irregular proceedings had been taken in a superior Court and never set aside: the law as to cases before inferior Courts, or justices of the peace, is

(a) The Attorney General read 9 A. & E. pp. 228, 229, from "Although in the case,"—to "competent jurisdiction."

laid down by *TINDAL, C, J., in *Morrell* v. *Martin*, 3 M. & G. [*444
581, 592—597. In the former case the action was brought in the Court from which the irregular process had issued: but it cannot be supposed that the rule would have been different if the plaintiff had gone to another Court. [MAULE, J. On the contrary, another Court would probably have said that they did not know what was irregular in the Exchequer.] In an Ecclesiastical Court no action lies against the Judge for excommunicating improperly, if he has acted within his jurisdiction; *Ackerley* v. *Parkinson*, 3 M. & S. 411: otherwise if he has exceeded the jurisdiction; *Beaurain* v. *Scott*, 3 Campb. 388: and the same law would apply in each case to the officer. This point, as to the responsibility of officers required to execute process, is made clear by the *Countess of Rutland's Case*, 6 Rep. 52 *b*, 54 *a*; *Andrews* v. *Marris*, 1 Q. B. 3, and the authorities there cited; *Carratt* v. *Morley*, 1 Q. B. 18; *Draper* v. *Blaney*, 2 Saund. 193; *Parsons* v. *Lloyd*, 2 W. Bl. 845; S. C. 3 Wils. 341, and *Grant* v. *Bagge*, 3 East, 128, 140. In all such cases, where the exemption of the officer has been recognised, it would be idle if the action, not lying in the Court from which the process issued, might be brought in another. Where, indeed, the superior Courts are exercising a power created by act of parliament, stricter rules prevail; as in the case of orders by the Lord Chancellor or Court of Review under stat. 6 G. 4, c. 16; *Muskett* v. *Drummond*, 10 B. & C. 153, which case was acted upon in *Christie* v. *Unwin*, 11 A. & E. 373; *Brancker* v. *Molyneux*, 4 Man. & G. 226. [PARKE, B. There is a *mistake in the report of *Christie* v. *Unwin*,(*a*) in 11 Adolphus [*445
and Ellis; the order was not made by the Lord Chancellor, but by the Court of Review. But perhaps it is not important whether such an order was issued by the Lord Chancellor exercising a special statutory power given to himself, or by a Court made a court by statute for specified purposes.(*b*) In *Harrison* v. *Wright*, 13 M. & W. 816, the objection, that a Judge of the Court of Exchequer had exceeded a statutory jurisdiction, was got over by the consent which parties had given to his order.] The distinction between statutory and common law jurisdiction seems contemplated by Lord ELLENBOROUGH in *Burdett* v. *Abbot*, 14 East, 64, when he puts the case of an application to the Court to discharge on process void on the face of it: "as suppose the defect in the process were in a matter required by positive statute, of which all the Courts must take cognisance."

As to the cases cited to show that a superior court will judge of the process issuing from another Court: in *The Case of the Marshalsea*, 10

(*a*) 11 A. & E. 373. The reporters have referred to their note of the argument and judgments, and find that the inaccuracy pointed out in the text occurred as it appears in their work: they regret that it should have been retained, both in their report of the discussion and in their statement of the case.

(*b*) Stat. 1 & 2 W. 4, c. 56. See, as to the order in *Christie* v. *Unwin*, *Ex parte Hall*, 1 Mont. Deac & De Gex, 217, and Mr. Deacon's note, p. 219 (*b*).

The trespass alleged is an assault on the plaintiff, the carrying him along a passage to a room, and then along another passage to another room, and detaining him there.

The first and second pleas do not differ from each other in any respect necessary to be noticed. They both state that certain matters came on to be discussed and debated in the House of Commons; that it was considered by that House to be necessary that the plaintiff should be questioned and examined at the bar of the House touching these matters; that an order of the House was made that he should attend the House forthwith, of which order he had notice; that he wilfully and contemptuously refused to obey the order, and concealed himself for the purpose of avoiding attendance on the House; and thereupon, in order to compel the attendance of the plaintiff at the bar of the House to be questioned on those matters, it was ordered and resolved by the House that the plaintiff should be sent for and brought before the House in the custody of the Serjeant at Arms, and that the Speaker should issue his warrant *accordingly: that the Speaker did issue his warrant accordingly: by which warrant, after reciting therein that the House of Commons had that day ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms, he required and authorised the Serjeant at Arms to take into custody the body of the plaintiff: and the defendant then proceeds to justify, as Serjeant at Arms, all the trespasses complained of, including the detaining of the plaintiff until he could bring him before the House.

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The third plea states that it was ordered by the House that the plaintiff should attend the House to answer a charge against him of a breach and contempt of privilege; of which order he had notice; that he did not attend, but wilfully and contemptuously and without reasonable cause disregarded the order, and concealed and secreted himself; and thereupon an order and warrant, similar to those in the first and second pleas, were made, under which there is a similar justification.

The fourth plea states an order to attend (without assigning the cause of the order), and a wilful disobedience of the order and warrant as before.

Upon the argument of the demurrer to these pleas, the Court of Queen's Bench were divided: but judgment was given by the majority for the plaintiff; and that on the ground of a defect in the warrant: and the question which we have to decide is the same, whether the warrant was defective or not.

For it cannot be disputed that the House of Commons has by law the particular powers to take into custody which in the three first pleas it is expressly averred to have exercised: and we have nothing to do with any other. First, that the House, which forms the *Great Inquest of the Nation (4 Inst. p. 11), has a power to institute inquiries and to order the attendance of witnesses, and, in case of dis-

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bedience (whether it has not even without disobedience, we need not inquire), bring them in custody to the bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge: and, further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised. These are the only questions of privilege involved in this inquiry independently of the form of the warrant.

The first of these two propositions was rightly admitted in the judgments, in this case, of Lord DENMAN and my brother COLERIDGE, as well as in that of my brother WILLIAMS in this case, and was not disputed by my brother WIGHTMAN, nor at the bar on the argument of this case (see also *Stockdale* v. *Hansard*, 9 A. & E. 115:) and the second is equally clear; for it belongs at least to every superior Court.

The question therefore turns upon the form of the warrant alone. If it be good, and if it authorised all that is alleged to have been done by virtue of it, the defendant was justified: if it were bad, or if it did not authorise all that the defendant did, he was not justified; for it was admitted, and properly so, on the part of the defendant, that he could not justify under the order of *the House independently of the warrant, because the order authorised no *particular person* to take the plaintiff. To connect the defendant with the order, a warrant *to him* was necessary. [*452

The answer to the question as to the validity of the warrant depends mainly upon a preliminary point: on what principle is the instrument to be construed? Is it to be examined with the strictness with which we look at the warrants of magistrates or others acting by special statutory authority and out of the course of the common law, or is it to be regarded as the mandate or writ of a superior Court acting according to the course of the common law?

The Judges who composed the majority of the Court of Queen's Bench seem all to have thought that the Speaker's warrant was to be strictly construed; and Lord DENMAN and my brother COLERIDGE appear to have assimilated it to the warrant or commitment of a Justice of the Peace, and applied the same rules of construction to which such an instrument is always subjected. All these three Judges held it to be void, because it did not show a sufficient authority on the face of it to justify the defendant in all he admitted to have done, though they did not agree in the nature of the defect. If this had been the case of a magistrate acting under some statute which gave him a special authority to take a man into custody under the same circumstances as are stated in the three first pleas, we should no doubt have agreed with those learned Judges that a warrant in a similar form would have been void, those circum-

stances not appearing upon the face of it; for, in the case of special authorities given by statute to justices or others acting out of the ordi-
*453] nary course of *the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable intendment. Not so the process of superior Courts acting by the authority of the common law. In the argument of the case of *Peacock* v. *Bell*, 1 Saund. 74, the rule as to pleading is well expressed thus: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so;" "nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged:" and therefore the majority of the Court held that, the Courts of Counties Palatine being superior Courts, the record in those Courts need not state the cause of action to have arisen within the jurisdiction. In like manner it is presumed, with respect to such writs as are actually issued by superior Courts, that they are duly issued, and in a case in which they have jurisdiction, unless the contrary appears on the face of them; as it would, for instance, if a writ of capias for a criminal matter issued from the Common Pleas, or a writ in a real action (before the abolition of such remedies) from the King's Bench, or a real action, not in the Crown's case, in the Exchequer: in all which cases the want of jurisdiction would appear. But writs issued by a superior Court, not appearing to be out of the scope of their jurisdiction, are valid, and of themselves, without any further allegation, a protection to all officers and others in their aid
*454] *acting under them; and that although they be on the face of them irregular, as a capias against a peeress (*Countess of Rutland's Case*, 6 Rep. 54, *a*); or void in form, as a capias ad respondendum not returnable the next term, *Parsons* v. *Lloyd*, 3 Wils. 341; for the officers ought not to examine the judicial act of the Court whose servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it; *Turner* v. *Felgate*, 1 Lev. 95; *Cotes* v. *Michill*, 3 Lev. 20. Many of the writs issued by superior Courts do upon the face of them recite the cause of their issuing and show their legality; writs of execution for instance: others however do not, and, though unquestionably valid, are framed in a form which, if they had proceeded from magistrates or persons having a special jurisdiction unknown to the common law, would have been clearly insufficient and rendered them altogether void. A capias ad respondendum, for example, issued before the recent statute 1 & 2 Vict. c. 110, states no original writ, no affidavit of debt, nor any plea commenced before the capias issued; and it is still unquestionably valid: yet, if, instead of being issued by a superior Court, it had proceeded from an individual who had a special limited

power by a statute, after an original writ from Chancery directed to him, or after a suit instituted and affidavit of debt, to command another to be arrested, a warrant in this form would have been as clearly bad. So the forms of writs of attachment from the superior Courts do not state the previous steps, of a charge of contempt, the rule of Court that it should issue, or the nature of the *contempt. That issued from the Com- [*455
mon Pleas (not against officers of the Court merely, but against individuals) is simply to order the sheriff to bring the party into Court on a certain day to answer to Her Majesty of and concerning *those things* which on Her behalf shall then and there be objected against him. There is no recital of any previous proceeding, no statement of the nature of the charge, none of the adjudication of the Court that it ought to be answered; yet this writ is as unquestionably good as it would have been unquestionably bad had it been issued by a magistrate or other individual who had a special jurisdiction to punish for such offences as would constitute a contempt of Court or any other particular offence. It appears, indeed, that, if a writ of a superior Court expressed no cause at all, it would be legal, and the defendant not bailable, according to what Lord COKE says in *The Brewers' Case*, 1 Roll. Rep. 134. It was a mistake to assert, as was done at the bar, that an adjudication of a contempt was a necessary part of every committal for a contempt, and that an attachment would be invalid without it. It is not so in the superior Courts of common law, as has been before stated, nor in the Court of Chancery, as Lord LYNDHURST has lately decided; *Ex parte Van Sandau*, 1 Phillips, 445, 605.

The proceedings of the House of Commons in the two cases stated in the pleadings, in each of which it is acting for itself and enforcing its own lawful authority, bear a close analogy to cases of contempt in which the superior Courts in Westminster Hall are acting for themselves and are enforcing theirs. If, in these Courts, the *writ of attachment [*456
need not state any special grounds in order to show that the Court is acting duly, formally and regularly, what good reason can be assigned for requiring the House of Commons to do so? If the writ of attachment in the general form used is a protection to the sheriff, the officer of the Court executing it (as it undoubtedly is), and he need state nothing in his plea but the issuing of the attachment (Levinz's Entries, p. 191;(a) *Britton* v. *Cole*, 1 Salk. 408, Com. Dig. *Pleader* (3 M. 24)), why should not the warrant of the Speaker in a general form be equally a protection to the Serjeant at Arms, the proper officer of the House? We are clearly of opinion that at least *as much* respect is to be shown, and as much authority to be attributed, to these mandates of the House as to those of the highest Courts in the country; and, if the officers of the ordinary Courts are bound to obey the process delivered to them, and are therefore protected by it, the officer of the House of Commons

(a) *Osborne* v. *Brookhouse.*

is as much bound and equally protected. The House of Commons is a part of the High Court of Parliament, which is without question not merely a superior but the supreme Court in this country, and higher than the ordinary Courts of law; Lord CAMDEN in *Entick* v. *Carrington*, 19 How. St. Tr. 1047. And, if we give credit to the Courts of common law that they will not issue writs of attachment except in due course and in accordance with the powers which the law gives them, and that notwithstanding the possible abuse of the liberty of the subject to which this principle may give rise by enabling a Court to imprison for any cause, why should we not equally give credit to both branches *457] *of the High Court of Parliament that they also will duly execute their powers in obedience to the law from which they derive them, and to which, in common with all other Courts, they are subject, though this course may also possibly lead to the same consequence, the abuse of the liberty of the subject by their imprisoning any one at their mere will and pleasure? The possibility of abuse, which is urged as an objection to the power of either House to issue its mandate in such a form, is no valid argument against its existence. If it were, it would apply equally to all the superior Courts, which without doubt have such power; and it would apply also to the other admitted legal powers of these Courts, which may be abused without adequate remedy. In case of an improper exercise of the power of attachment by a Court of law or equity, or by either branch of the High Court of Parliament, there can be no appeal: the only remedy is by application to the sense of justice of each Court: and it would be improper to suppose that any one of them would be more likely to abuse the power, or less likely to grant redress, than another.

That the rule which we have stated does prevail with respect to the proceedings of the High Court of Parliament is proved by numerous authorities. Mr. Justice POWYS, in *Regina* v. *Paty*, 2 Ld. Ray. 1108, says that "the House of Commons is a great Court, and all things done by them are intended to have been ritè acta, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of Court of two lines, and such commitments are held *458] *good, because it is to be intended, that we understand what we do." Mr. Justice BLACKSTONE says, in *Brass Crosby's Case*, 3 Wils. 205: "Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House, and their execution, are according to law." And Hawkins sums up the authority thus: "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses, and that wherever the contrary *does not plainly and expressly appear*, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of parliament, and the rules of law and justice:" 3 Hawk. P. C.

219, B. 2, c. 15, s. 73. Citations may be multiplied to the same effect. Sir T. Jones in *Lord Shaftesbury's Case*, 6 How. St. Tr. 1296: "The course of all Courts ought to be considered, for that is the law of the Court," "and it has not been affirmed, that the usage of the House of Lords has used to express the matter more particularly on commitments for contempts, and therefore I shall take it to be according to the course of Parliament." GOULD, J., in *Regina* v. *Paty*: "A commitment of the House of Commons, which is superior to this Court," "is not reversible for form." Lord TENTERDEN, in *Rex* v. *Hobhouse*, 2 Chit. Rep. 210, says: "We cannot inquire into the form of the commitment, even supposing it is open to objection on the ground of informality."

If, then, we construe the warrant of the Speaker with only the same respect that we should show to a writ out of any of the Courts of Westminster, we clearly *think we ought to hold it to be valid. From the three first pleas we know that in fact it issued in a matter in [*459 which the House had clearly jurisdiction, and that it properly issued; and in its form there is nothing to show the contrary. The matter in the fourth plea, though it does not show affirmatively that it did issue in a matter within their jurisdiction, does not show the contrary: and, as the order is within the scope of their general jurisdiction, we cannot say that it was unduly made. The House had an undoubted right to order the plaintiff into custody, and to have him brought to the bar, and had also as much right over its own forms as any other court has. It must be presumed that this is the right form, being that which it has chosen to adopt: and, if we inform ourselves by consulting precedents, we know that it is in a form not improper; for there are many in a form as general with respect to the recital, and some equally so as to the mandatory part; Printed Report of the Committee of Privilege in *Howard* v. *Gosset*, 99, 101, 103, 104, 105, 115.(*a*)

For these reasons we think that the warrant was valid. And the difference between the opinion of this Court and that of the majority of the Queen's Bench is only this: that they construe the warrant as they would that of a magistrate, we construe it as a writ from the superior Court. The authorities relied upon by them relate to the warrants and commitments of magistrates; they do not apply to the writ and mandates of superior *Courts, still less to those of either branch of [*460 the High Court of Parliament.

One question only remains: Was the warrant such as to authorise all the trespasses complained of? It appears to us that we ought to read the mandatory part in connexion with the recital: and, so reading it, it seems to us clear that it authorises the defendant to do that which the recited order commanded: viz., not merely to take the plaintiff, but to

(*a*) Second Report from "the Select Committee appointed to enquire into the proceedings of the action of *Howard* v. *Gosset*,, and to report their observations and opinions thereon to the House." Dated 20th June, 1845. Appendix, Nos. 4, 5.

bring him to the bar. In this respect both my late brother WILLIAMS and my brother COLERIDGE, and we think rightly, differed from Lord DENMAN and my brother WIGHTMAN.

We agree therefore with my late brother WILLIAMS, and consider this warrant as valid; and are of opinion also that the defendant was justified by it in all which he did.

And for these reasons we think that the judgment of the Court of Queen's Bench on all the pleas ought to be reversed.

Judgment reversed.

END OF HILARY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Easter Term and Vacation,

X. VICTORIA.

The Judges who usually sat in Banc in this Term and Vacation were

Lord DENMAN, C. J. — WIGHTMAN, J.
PATTESON, J. — ERLE, J.

PEMBERTON, Clerk, *v.* COLLS, Clerk. *April* 15.

Case for slander of a clergyman.

1st count stating words spoken of plaintiff in his profession as follows (with innuendoes, and an inducement stating only that plaintiff was vicar of a church, and defendant a clergyman, and that plaintiff had always conducted himself well in his profession): "The very day I came into residence, Dr. P." (plaintiff) "sent for me: I went and dined with him; and the wine must have been drugged; for I took but two glasses and was quite stupified. While in this condition, Dr. P. put a bill into my hands and requested me to sign it, saying, 'I wish to have it as a security for the payment of 130*l.* per annum for reading for you at the new church.' I answered, 'Well, give me a pen and I will sign it.' Immediately I had signed it, Dr. P. snatched it up, and laughing, said, 'this will be quite safe.' The bill, I think, was drawn for 2500*l.* or 2600*l.*: but, having been stupified with the wine, I do not rightly remember." "You cannot suppose that I can visit a man who so cheated me at my first coming." Innuendo, that plaintiff fraudulently obtained the bill from defendant while he was stupified with drugged wine.

2d count, stating words spoken of plaintiff in his profession (with innuendoes, but no further material inducement) as follows: "Dr P. placed before me a bill. I signed: I do not know for what amount it was, whether for 2000*l.* or 3000*l.*; for I was completely pigeoned by Dr. P.:" innuendo, that plaintiff had obtained the bill from defendant by fraud.

Special damage, that plaintiff's curate believed him guilty of the misconduct, and, by reason thereof, was prevented from cordially and effectually assisting plaintiff in the clerical duties and spiritual concerns of the parish.

On motion in arrest of judgment, after verdict for plaintiff, *Held*

That the 1st count was good, because the words there set forth reflected upon the plaintiff in his profession.

That the 2d count was bad, because the words there did not so reflect.

Venire de novo awarded.

CASE. The first count of the declaration stated that, before and at the time of the committing, &c., plaintiff had been and was a clergyman of the United *Church of England and Ireland as by law [*462

established, in Holy Orders, and then was the vicar of the vicarage of Wandsworth in the diocese of Winchester in England: that plaintiff has always conducted himself in his said function and character of a clergyman with piety, honesty and morality: that defendant was also a clergyman of the United Church, &c.: yet defendant, well knowing the premises, but contriving, &c., to injure plaintiff and also the character of the plaintiff, and to degrade him in his said character of a clergyman, heretofore, and after the passing of a certain statute made, &c. (3 & 4 Vict. c. 86), intituled "An act for better enforcing church discipline," to wit, on, &c., in a certain discourse which defendant then had with one George William Cockerell and divers other good and worthy subjects, &c., of and concerning plaintiff and of and concerning him in his said profession of a clergyman, and relating to himself the defendant, in the presence and hearing of the said G. W. C., falsely and maliciously spoke and published of and concerning the plaintiff the several false, scandalous, malicious and defamatory words following of and concerning plaintiff, and of and concerning him in his said profession of a clergyman of the said United Church, and relating to himself, the said defendant: viz. "The very day I" (meaning defendant) "came into residence, Dr. Pemberton" (meaning plaintiff) "sent for me" (meaning defendant): "I" *463] (meaning defendant) "went and *dined with him" (meaning plaintiff); "and the wine must have been drugged; for I" (meaning defendant) "took but two glasses, and was quite stupified. While in this condition, Dr. Pemberton" (meaning plaintiff) "put a bill into my hands, and requested me" (meaning defendant) "to sign it, saying, 'Colls'" (meaning defendant), "'just put your name to this; I wish to have it as a security for the payment of 130*l.* per annum for reading for you at the new church.' I" (meaning defendant) "answered, 'Well, give me a pen and I will sign it; but I thought I had sufficiently satisfied you'" (meaning plaintiff). "Immediately I" (meaning defendant) "had signed it, Dr. Pemberton" (meaning plaintiff) "snatched it up and walked to the fire in order to dry the signature, and, laughing, said, 'This will be quite safe: I'" (meaning plaintiff) "'will take care of this.' The bill, I" (meaning defendant) "think, was drawn for 2500*l.* or 2600*l.*: but, having been stupified with the wine, I" (meaning defendant) "do not rightly remember." And, in another part of the same discourse which defendant then had with the said G. W. C. of and concerning plaintiff, the defendant, in the presence and hearing of the said G. W. C. falsely and maliciously spoke and published of and concerning plaintiff the other false, &c., words following of and concerning plaintiff, and of and concerning him in his said profession of a clergyman as aforesaid, and of and relating to himself the defendant, viz.: "You cannot suppose that I" (meaning defendant) "can visit a man" (meaning plaintiff) "who so cheated me" (meaning defendant) "at my first coming" (thereby meaning that plaintiff had fraudulently obtained the said bill

from defendant, whilst he, defendant, was stupified with drugged wine). *The second count stated: That, after the passing of the statute, &c., to wit, on, &c., defendant, further contriving, &c., to [*464 injure plaintiff and to degrade him in his said character of a clergyman, in a certain other discourse which defendant then had with a certain other person, to wit, one Charles Haydon, and divers other good, &c., of and concerning plaintiff, and of and concerning him in his said profession of a clergyman of the said united church, and relating to himself, defendant, in the presence and hearing of the said Charles Haydon, and in the presence and hearing of the said other good, &c., falsely and maliciously spoke and published of and concerning plaintiff, and of and concerning him in his said profession, the several false, &c., words following of and concerning plaintiff, and of and concerning him in his said profession of a clergyman as aforesaid, and relating to himself the defendant, viz. "Dr. Pemberton" (meaning plaintiff) "placed before me" (meaning defendant) "a bill. I" (meaning defendant) "signed: I" (meaning defendant) "do not know for what amount it was, whether for 2000*l.* or 3000*l.*; for I" (meaning defendant) "was completely pigeoned by Dr. Pemberton" (meaning plaintiff; thereby meaning that plaintiff had obtained the said bill from defendant by fraud).

There was a third count, which it is unnecessary to state.

The declaration concluded by averring that, by means of the premises, plaintiff has been and is greatly injured in his said character and profession of a clergyman, and brought into public scandal, &c.; insomuch that divers neighbours, &c., have, by reason, &c., suspected and *believed, and still suspect, &c., plaintiff to have been guilty of [*465 the misconduct so imputed to him by defendant, and to be a person of immoral and irreligious character. And also, by means of the premises, the said G. W. Cockerell, then being the curate of the plaintiff in the said parish of Wandsworth, did suspect and believe plaintiff to have been guilty of the misconduct so as aforesaid imputed to plaintiff by defendant, and then, and for a long space of time, to wit, &c., during all which time the said G. W. C. continued to be the curate of plaintiff in the said parish, the said G. W. C., by reason of the premises, and by reason of his so suspecting, &c., as aforesaid, was prevented from cordially and effectually acting with and assisting plaintiff in the clerical duties and the spiritual concerns of the said parish as he otherwise would have done. Other special damage was laid, which it is unnecessary to state.(*a*)

Pleas. 1. Not guilty. Issue thereon. 2. As to that part, and so much, of the said declaration, wherein it is alleged that by means of the premises the said G. W. Cockerell, &c. (reciting the special damage first above set forth); and that also by means, of the premises, &c. (reciting the other special damage): defendant says: That the said supposed

(*a*) There was no evidence of it at the trial, and the Lord Chief Justice so directed the jury.

occurrences, matters and things as aforesaid in this plea mentioned did not, nor did any or either of them, or any part thereof respectively, occur, happen or arise through or by means or by reason of the premises in the declaration mentioned, or any or either of them or any part
*466] thereof, in manner and form *as in the said declaration is in that behalf alleged. Conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Kingston Spring Assizes, 1846, a verdict was found for the plaintiff on the first and second counts with 200*l.* damages.(*a*) In Easter term, 1846, *Shee*, Serjt., obtained a rule to show cause why the judgment should not be arrested on the ground that no actionable slander appeared on the record; or why a venire de novo should not be awarded, or a new trial had. He cited note (1) to *Hambleton* v. *Veere*, 2 Wms. Saund. 171 a, 6th ed.(*b*)

Chambers and *Peacock* now showed cause.(*c*) If only one of the counts be good, judgment will not be arrested, but a venire de novo awarded.(*d*) But both the first and the second count are good; for each sets out a slander actionable even without special damage. Causing a person, under the influence of drugs, to sign that which he is disabled from understanding, is a cheat of the class mentioned in 2 Hawk. P. C. 113 (7th ed.), b. 1, c. 71, s. 1, as punishable at common law: and the charge need not appear, in a count for slander, with the precision required in an indictment. But, further, the plaintiff is averred to have been a clerk in Holy Orders; the words had reference to him in that character, and were injurious to him in his profession, and
*467] *were therefore actionable, according to the rule laid down in 1 Starkie on Slander, 117, et. seq. (2d ed.), c. 3. The charge was one which might have subjected him to suspension or deprivation, to ecclesiastical censure, or to punishment under the Church Discipline Act, 3 & 4 Vict. c. 86. Ayliffe, Parerg. 208, states, as the causes of deprivation generally, want of capacity, contempt, and crimes; and then, in a more particular enumeration, speaks of "irreligion, gross scandal; some heinous crime, as murder, manslaughter, perjury, forgery, &c." The charge in question implies at least a "gross scandal." Again, Ayliffe, ib. 238, treats the offences punishable by ecclesiastical jurisdiction as forming three classes, the second comprehending those contrary "to justice towards our neighbour," of which kind are simony, usury, defamation, subornation of perjury in an ecclesiastical Court," &c. But, independently of ecclesiastical punishment or loss of professional advantage, the words are slanderous as tending to lessen the plaintiff's efficiency in his profession, and on this ground are actionable, as it is to say of a

(*a*) The verdict was taken without excluding any part of the special damage: but it was agreed on the discussion in Banc, that there was no foundation for a verdict except as to the damage above set forth; and the case was argued as if the form of the postea had excluded any other.

(*b*) And see note (*b*) ibid.

(*c*) Before Lord DENMAN, C. J., PATTESON, WIGHTMAN, and ERLE, Js.

(*d*) See *Day* v. *Robinson*, 1 A. & E. 554; *Empson* v. *Griffin*, 11 A. & E. 186.

physician that he is "no scholar;" *Cawdry* v. *Highley*, Cro. Car. 270; of a barrister that he is "a dunce;" *Peard* v. *Jones*, Cro. Car. 382: or to slander a justice of peace in his office (though no pecuniary loss can follow); or to say of a tradesman that he is insolvent, though the words be not coupled with any mention of his dealings in trade; 1 Stark. Sland. 119, 130, 139, c. 3. [PATTESON, J. Insolvency has a direct reference to the tradesman's ability to carry on his business. But would it be actionable to say of a tradesman, without reference to his business, that he *had been guilty of fraud?] To say that a [*468 clergyman has committed such an offence implies that he is not competent to carry on his profession. [PATTESON, J. Then you would contend that any vituperative words, spoken of a clergyman, are actionable.] The distinction applying to this point is thus laid down by Mr. Starkie: "Where the office, profession, or employment of the plaintiff, requires great talent and high mental attainments, general words, imputing want of ability, are actionable without express reference to his particular character, for they necessarily include an ability" (inability(*a*)) "to discharge the duties of such a situation; but where the employment is of a mere mechanical nature, the words to be actionable must be applied to it clearly and unequivocally:" 1 Stark. Sland. 135. *Blunden* v. *Eustace*, Cro. J. 504, is an instance in which general words were held actionable because they implied unfitness for a place usually filled by an officer of skill and responsibility. The cases of the physician and barrister turn upon the same principle. To charge a physician with insolvency would not be actionable. The principle contended for is also explained in the following passage. "Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation:" 1 Stark. Sland. 131. The author adds, as examples, the dictum in **Lord Townsend* v. [*469 *Dr. Hughes*, 2 Mod. 150, 160,(*b*) that to say of a bishop "he is a wicked man" is actionable; and the decision in *How* v. *Prin*, Holt, 652, S. C. 7 Mod. 107, that an action lies for saying of a justice of peace that he was "a Jacobite, and for bringing in the Prince of Wales and popery." In the present case, therefore, it is sufficient that, the plaintiff being a clergyman, the defendant accused him of fraud. So it would be actionable to call a military officer a coward, though without express reference to his profession. [PATTESON, J. The words here are laid as spoken of the plaintiff in his profession; but they do not

(*a*) So in 1st. edit. p. 132.

(*b*) The dictum (by SCROGGS, J.) seems to have been pronounced with reference to actions of scandalum magnatum, grounded on stat. 2 R. 2, c. 5. And see the judgments of ATKINS, J. and NORTH, C. J.

*473] *Lord DENMAN, C. J., in this term (May 8th), delivered the judgment of the Court.

Without entering into a lengthened examination of the decisions on the questions raised, we think it enough to say that the imputation cast on the plaintiff by the words set forth in the first count appears to us to reflect on the plaintiff in his professional character; and that cast on him in the second count does not so affect him within the meaning of the cases.

The consequence is, as the damages were taken on the two jointly, that a venire de novo must be awarded, that the damages may be assessed on the good count only. Rule absolute for a venire de novo.(*a*)

(*a*) See *Le Fanu* v. *Malcomson*, 1 H. L. Ca. 637.

DOE dem. PLUMER *v.* MAINBY. *April* 15.

Premises were demised under a written agreement, dated 4th August, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of 55*l.* payable half-yearly, "except the *last half year*, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear." Tenant "to allow the landlord, or incoming tenant, *in the last year*, to enter on 1st May, to make fallows, and carry out the manure," for which compensation was to be paid, &c. Tenant to have "the use of the barns for stacking and threshing the crops of *the last year* till the 1st day of May after the tenancy."

Held, that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year.

Consequently that the tenancy was determined by a notice dated 24th March, 1846, to quit at Michaelmas that year.

EJECTMENT for messuages and land in the parish of Lindfield, Sussex. Demise, 10th December, 1846.

On the trial, before WILDE, C. J., at the Sussex Spring Assizes, 1847, it appeared that the lessor of the plaintiff, being mortgagee of the premises, entered into the following agreement, in writing, with the defendant.

*474] "Terms and conditions for letting Townland farm and *premises, and land called the Lime Pits, in Lindfield, in possession of Mr. John Plumer as mortgagee, to the undersigned tenant. The tenant has purchased the present crops, and feeding of the aftergrass, and half dressings and seeds sown, now taken possession of by W. Plumer, under a writ of possession, for the sum of 150*l.* The tenancy to be from year to year from Michaelmas next, at the net yearly sum of 55*l.*, payable half yearly at Lady Day and Michaelmas, except the last half year, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear, any law or usage to the contrary notwithstanding. The tenant to dress the arable and meadow lands in due course of husbandry, so as to keep the same in good heart and condition: to allow the landlord, or incoming tenant, in the last year, to enter on the first

day of May, to make fallows and carry out the manure, for which a compensation for rent and taxes, and also for manure in the yard or on the mixen on the premises, shall be allowed, according to the custom of the country. He shall keep the houses, buildings, fences, gates and trees in tenantable repair, being allowed rough timber by the landlord upon or within three miles of the premises. The tenant shall not underlet any part of the premises, or use or suffer the same to be used as a beer shop, and shall allow the landlord at all seasonable times to enter and view the condition of the premises; and, in all respects not herein mentioned, the tenant shall cultivate the farm according to the custom of the country, in like manner as if the cultivation and management thereof were herein particularised: and to be allowed the use of the barns for stacking and *threshing the crops of the last year till the first day of May after the tenancy, and the manure so made to be paid for according to the custom of the country. And the said farm and premises are so let accordingly. Witness our hands the 4th August, 1845. [*475

"D. STEDMAN, agent for Mr. PLUMER.
"J. H. MAINBY."

Under this agreement, defendant came into possession: and, on 26th March, 1846, he was served with a notice to quit at Michaelmas, 1846. It was contended at the trial, on his behalf, that the terms of the agreement necessarily imported that the tenancy was to last beyond the first year. WILDE, C. J., held that the notice to quit determined the tenancy at Michaelmas, 1846. Verdict for plaintiff.

Shee, Serjt., now moved for a new trial on the ground of misdirection; and contended that, taking the whole agreement together, it was not intended that the landlord should have power to determine the tenancy at the end of the first year. The words "in the last year" import that more than a year's tenancy was intended; for instance, the rent for the "last half year" is to be paid on the first of August in that year, and to be deemed then due: if this applies to the first year, the tenant was liable to be turned out, on failure of payment of rent, before he could have received any benefit from the farm. Again: in the "last year" the tenant is to allow the landlord or incoming tenant to enter on the first day of May to make fallows: it cannot have been contemplated that this should take place in the first year, the tenancy having commenced at *Michaelmas. The same intention is evident from the rest of the stipulations. [*476

Lord DENMAN, C. J. These observations only show what was contemplated by the parties as possible or probable; not any binding arrangement. Certain contingencies are provided for, in case the tenancy should last for more than one year. But the agreement does not, therefore, create a tenancy necessarily for more than one year.

PATTESON, WIGHTMAN and ERLE, Js., concurred. Rule refused.(a)

(a) Reported by H. Merivale, Esq.

DOE on the several demises of RICHARDS and Another v. EVANS.

April 16.

Where land has been improved in value by building between the owner's death and the grant of administration to his estate, stamp duty on the letters of administration is payable for the improved value.

EJECTMENT for leasehold premises in Glamorganshire.

On the trial, before WIGHTMAN, J., at the Glamorganshire Spring Assizes, 1846, the lessor of the plaintiff, who claimed as administrator, offered in evidence letters of administration, which bore the proper stamp for an estate sworn under 100*l.* Between the time of the intestate's death and the time of taking out administration, the value of the property in dispute had been much increased by building. Evidence was given that the value of the property at the time of administration granted was more than 100*l.*: and it was objected that the stamp duty was to be regulated by the value at that time, and not by the value at
*477] the time of the *intestate's decease. The jury found, in answer to questions by the learned Judge, that the property was not worth 100*l.* when the intestate died, and that it was worth more than 100*l.* when administration was granted. The learned Judge received the letters of administration in evidence, and directed a verdict for the lessor of the plaintiff, subject to a motion to enter the verdict for the defendant on the above objection to the stamp.

Chilton, in last Easter term, obtained a rule nisi accordingly.

Evans and *Davison* now showed cause. This is a question upon which no authority is to be found: but on principle it is clear that the value of property, for the purpose of stamp duty on probate and letters of administration, must be taken at the time when such property was in possession of the deceased. By stat. 55 G. 3, c. 184, s. 38, before probate or letters of administration can be granted, an affidavit is required that the "estate and effects *of the deceased*, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the *deceased* shall have been *possessed of* or entitled to as trustee," &c., "are under the value of a certain sum to be therein specified," &c. In this case, the estate *of the deceased* was not of the value of 100*l.*, and the letters were properly stamped. The stamp laws are to be construed in favour of the subject. [PATTESON, J. If the land had risen in value by a railway coming near it, or by drainage, would not the duty be payable on the improved value? The difficulty I feel is to separate the improved value from the corpus of the property which was possessed
*478] by the *deceased.] In Gwynne on the law relating to the Duties on Probates and Letters of Administration, p. 25,(*a*), it is stated that "The commissioners of stamps require all rents, interest, and dividends from the death of the testator or intestate to the date of the probate or letters of administration to be included in the estimate upon

(*a*) 3d ed. 1841.

which duty is paid; but it is to be observed that there has been no judicial decision upon the point, and that counsel of great eminence have held a different opinion." In the cases there referred to, the increased value is a mere accretion of the principal, which was in possession of the deceased. Here the value of the property has been increased by an addition of something extrinsic.

Chilton and *Peacock*, contrà, were not heard.

Lord DENMAN, C. J. The improvement is inseparably part of that which the deceased had, and of which administration was granted, and the Court cannot enter into the consideration of the value at the time of his decease.

PATTESON, WIGHTMAN and ERLE, Js., concurred.

Rule absolute.(*a*)

(*b*) Reported by H. Davison, Esq.

*LANE *v.* RIDLEY. *April* 16. [*479

Assumpsit against acceptor of a bill of exchange, indorsed by drawer to plaintiff.

Plea, that defendant accepted for the accommodation of the drawer, and that there never was any value or consideration for defendant's acceptance, or for the payment of the bill by him; that, after the bill became due, and before action, the drawer paid plaintiff the amount; and that plaintiff always held, and still holds, the bill without value or consideration.

Replication, that the bill was not accepted for the drawer's accommodation, and that the drawer did not pay the amount of the bill, modo et formâ.

A demurrer to the replication for duplicity was set aside as frivolous by a Judge's order.

Held, on motion to rescind the order, that the plea was itself double, and the replication therefore not objectionable for duplicity.

Held, also, that the jurisdiction of a Judge at chambers in setting aside demurrers as frivolous is of so beneficial a tendency that the Court will not encourage applications calling on them to interfere with it.

ASSUMPSIT on a bill of exchange, accepted by defendant, and indorsed by the drawer to plaintiff.

Plea. That defendant accepted the bill for the accommodation, and at the request, of the drawer, and that there never was any value or consideration for defendant's acceptance, or for the payment by him of the amount thereof, or of any part thereof; and that, after the bill became due, and before commencement of the suit, to wit, on, &c., and on other days, &c., the drawer paid to plaintiff divers moneys, to wit, to the amount of the bill, in full satisfaction and discharge thereof; and plaintiff then accepted of the drawer the said moneys in such full satisfaction, &c., as aforesaid. And plaintiff hath always held and still holds the bill of exchange without any value or consideration. Verification.

Replication. That the bill of exchange was not accepted for the accommodation of the drawer, nor did the drawer pay to the plaintiff, or the plaintiff accept of the drawer, the moneys in the plea mentioned, in such full satisfaction and discharge of the bill of exchange, in manner and form, &c. Conclusion to the country.

Special demurrer: for that the replication leaves unanswered a material part of the plea (that is to say), *that there never was any *480] value or consideration for the acceptance of the bill, or for the payment by defendant of the amount thereof, or of any part thereof, and that plaintiff always held and still holds the bill without value or consideration; and also for that the replication is double, in denying, as well that the bill was accepted for the accommodation of the drawer, as that the drawer paid the amount of the bill to the plaintiff.

An order having been made by ERLE, J., at chambers for setting aside the above demurrer as frivolous:

Bramwell now moved(*a*) for a rule to show cause why the order should not be rescinded. The demurrer is well founded. The question is whether the plea is double; if it is, the replication certainly cannot be objected to for duplicity. But the plea is not double. It alleges, first, that the defendant accepted the bill for the accommodation of the drawer. That allegation of itself would, of course, be no answer to the indorsee. The plea therefore goes on to allege, secondly, that the indorsee has been paid by the drawer. The latter allegation also would by itself be no answer to the indorsee, for, if this had not been an accommodation acceptance, the indorsee, after having been paid by the drawer, would be entitled to sue on the bill as trustee for the drawer; *Wiffen* v. *Roberts*, 1 Esp. N. P. C. 261; *Reid* v. *Furnival*, 1 C. & M. 538. The replication, therefore, as both the allegations in the plea are material, would have been good if it had denied either that this was an accommodation bill or that it had been paid by the drawer; and, as it has denied both these facts, it is properly demurred to for duplicity.

Cur. adv. vult.

*Lord DENMAN, C. J., on a subsequent day in this term (May *481] 8th), delivered the judgment of the Court.

Mr. *Bramwell* moved for a rule to rescind an order of my brother ERLE for setting aside a demurrer to a replication for duplicity, as frivolous. But, according to the case of *Pursoord* v. *Peek*, 9 M. & W. 196, the plea was objectionable for duplicity; and the defendant has no right to demur to a replication for duplicity which is occasioned by this plea; *Reynolds* v. *Blackburn*, 7 A. & E. 161; *Pascoe* v. *Vyvyan*, 1 Dowl. P. C. (N. S.), 939.

In refusing this rule we think it right to declare our opinion that applications for such rules ought to be discountenanced. The Court must obviously possess a discretionary power to set aside frivolous demurrers, or pleadings, to preserve its own records from abuse, the public time from being wasted, to prevent the useless accumulation of costs to the impoverishment and perhaps ruin of the client and to the ultimate advantage of those only who ought to protect him from these evils, and the delay, the defeat, the complete perversion of justice. But

(*a*) Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

it is manifest that all these evils will be aggravated, if the exercise of a Judge's discretion is frequently made the subject of appeal to the Court. When the Court clearly sees an attempt to secure a triumph to falsehood by means of a bad pleading, the possibility of a doubt being raised by argument affords no reason for interfering with the Judge's discretion.

It is sometimes said that the suitor ought not to be deprived of his writ of error by this summary proceeding: and, indeed, if he was barred from setting up a true defence by some refined rule of pleading, that *would be oppression and injustice. But to prevent the obstruction of truth and the delay of justice by a writ of error is one of [*482 the greatest benefits accruing from this jurisdiction; and it is often equally beneficial in a pecuniary point of view to both parties.(a)

Rule refused.(b)

(a) See *Trix* v. *Thorne*, 9 Q. B. 282.
(b) Reported by H. Davison, Esq.

HARRISON *v.* TURNER. *April* 19.

To assumpsit on an attorney's bill of costs, defendant pleaded a set off, and, in support of that plea, put in an account furnished to him by plaintiff. Plaintiff's credit side of the account contained his claim for costs, but of this no signed bill had been delivered, and defendant therefore contended that the debit side only of plaintiff's account could be looked to:
Held, that the whole account was evidence for the jury, as the non-delivery of a signed bill does not bar the debt, but merely (if insisted on) prevents its recovery by action.

ASSUMPSIT. The 3d count of the declaration was for work and labour, and the 5th for money paid.

Plea. 1. (except as to the first two counts, which were upon bills of exchange) Non assumpsit. Issue thereon.

8. As to part of the sum in the 3d and 5th counts mentioned, that the claim was in respect of work done, and disbursements made, by the plaintiff, as an attorney; and that no signed bill had been delivered one month before action. Verification. 10. To the whole declaration, a set off for goods sold and delivered.

The replication traversed the last two pleas; and issue was joined on this replication.

On the trial, before ERLE, J., at the Middlesex sittings after last Hilary term, the defendant, in order to prove his set off, gave in evidence an account which had been furnished to him by the plaintiff. In this account the plaintiff claimed credit for the amount of his bill of costs and other matters, and debited himself for goods sold and delivered. The account so made out showed a *balance in his favour; but [*483 without the bill of costs the balance would have been against him. No signed bill of costs had been delivered: and the defendant therefore contended that so much of the plaintiff's account as related to such bill must be struck out. The learned Judge decided that, as the defendant had put in the whole account, both sides of it were in evidence on the

issue joined upon the plea of set off; and that for this purpose it was immaterial whether any signed bill had been delivered or not.

Verdict for plaintiff on the issue as to the set off, and for defendant on the issue joined (on plea 8) as to the non-delivery of a signed bill.

Lush now moved(*a*) for a new trial on the ground of misdirection. The jury should have been directed to treat the account as if the bill of costs were struck out. [ERLE, J. The defendant cannot pray in aid the finding on the 8th issue. I dealt with the 10th issue as if set off were the only plea.] But the defendant may avail himself of the fact that no signed bill had been delivered. In *Rose* v. *Savory*, 2 New Ca. 145, the only evidence relied on by the plaintiffs was an account which had been furnished to them by the defendants; and it was held that an item to the credit of the defendants might be treated as struck out, because it was founded on an illegal contract. [PATTESON, J. In this case the demand in question was legal, and the defendant might or might not set up the answer that there had been no proper delivery of the bill.] *Cur. adv. vult.*

*484] *Lord DENMAN, C. J., in this term (April 30th), delivered the judgment of the Court.

In this case the defendant, in support of his plea of set off, put in an account furnished to him by the plaintiff, who was an attorney. In this account the plaintiff credited himself for the amount of a bill of costs, which he claimed to be due from the defendant, and debited himself for the amount of goods sold, which formed the subject of the defendant's set off. The defendant contended that so much of this account as related to the bill of costs was to be excluded from the consideration of the jury, because no signed bill had been delivered to him. We think this objection is not well founded; for the neglect to deliver such a bill merely prevents an attorney from recovering the amount by action, but it does not bar the bebt. Rule refused.(*a*)

(*a*) Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.
(*b*) Reported by H. Davison, Esq.

The QUEEN *v.* SAUNDERS, Esq. *April* 22.

A criminal information for misconduct in office may be moved for against a magistrate in the second term after the alleged misconduct, though an assize has intervened; the motion being made early enough to allow of cause being shown in the same term.

PASHLEY moved(*a*)for a rule to show cause why a crimimal information should not issue against the above named gentleman, on allegations of misconduct as a magistrate. The misconduct alleged occurred at a petty sessions, holden at Carmarthen on 12th December, 1846, when the defendant, as was averred, unjustly committed two suspected poachers

(*a*) Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and ERLE, Js.

for trial at the quarter sessions, where they were acquitted. Other wrongful acts, namely, refusals to furnish copies of *certain depositions in the case, were alleged to have taken place on 16th January, 1847. [Lord DENMAN, C. J. Is the application in time?] It is in time within the ordinary rule, even as regards the alleged misconduct in December, being in the next term but one after the offence, and in time for the magistrate to show cause during this term. It is true that in *Rex* v. *Harries*, 13 East, 270, this rule is qualified by the addition "no assizes having intervened:" but the point there was only noticed extrajudicially, and the authorities are the other way. *Cur. adv. vult.* [*485

On a subsequent day, *Pashley*, by leave of the Court, referred to *Rex* v. *Carpenter Smith*, 7 T. R. 80; *Rex* v. *Yeo*;(a) *Rex* v. *Marshall and Grantham*, 13 East, 322; *Rex* v. *Taylor*, Nolan's Rep. 204; Corner, Crown Office Practice, 171.(b)

The Court afterwards(c) granted the rule nisi, saying that the application was in time.(d)

(a) Referred to in *Rex* v. *Harries*, 13 East, 271, and reported in 1 Gude, C. Pr. 111, note (a).
(b) See *Rex* v. *Jollie*, 4 B. & Ad. 867, and 869, note (a)
(c) April 28.
(d) Cause was shown in Trinity term (June 11th) on the merits; and the rule was ultimately discharged.

This case is reported by H. Merivale, Esq.

*DOE on the demise of WILLIAM GROVES *v.* THOMAS GROVES. *April* 22. [*486

W. H., seised in fee of a house and land, died in 1798, leaving a widow, and his son J. H. a minor above fourteen years of age. The widow (with whom J. H. lived) continued to occupy the house and land. In 1798, J. H. being still a minor, the widow married the defendant, who continued thenceforward to occupy the house and land. In 1805 J. H. left the premises, but occasionally resided there afterwards for two or three weeks at a time, with defendant and his wife. The wife died in 1841. In 1842 J. H. mortgaged the premises in fee to the lessor of plaintiff for money which was paid to the defendant, defendant himself being present at the execution of the deed and privy to its contents, and receiving the money from J. H.

Held, that, in ejectment by the mortgagee, the jury were warranted in presuming that the defendant occupied as tenant at will to J. H.

EJECTMENT for a dwelling house and lands in the county of Chester. Demise, 8th January, 1846. On the trial, before COLTMAN, J., at the Chester Spring Assizes, 1846, the following facts appeared.

William Hart died intestate in January, 1798, seised in fee, and in possession, of the hereditaments in question. His widow Martha Hart, and his and her only son and heir, John Hart, a minor above fourteen years of age, survived him. Martha Hart was the sole guardian of John during his minority. No dower was ever assigned. On the death of William Hart, Martha and John inhabited a house with a garden, &c., part of the hereditaments, and continued to do so until the marriage of Martha with Thomas Groves, the defendant, in December, 1798. Ad-

ministration of the intestate's goods was granted to Martha on 13th May, 1798; and she took possession of his stock in trade, &c. Defendant, on his marriage with Martha, went to inhabit the same premises, and continued to reside on them with her and John Hart until John Hart left the premises in 1805, and, after his departure, down to the date of the action: defendant's name was over the door as a dealer in beer and tobacco; and the license *for tobacco was taken out in his name: and defendant also paid a chief rent, and was assessed to the poor's rate. He also paid off a mortgage debt on the premises. "Between 1805 and 1841" (in the language of the admissions in the cause), John Hart "occasionally resided two or three weeks at a time in the dwelling house inhabited by the defendant and his wife, being part of the hereditaments in the declaration mentioned, as part of the family of the said defendant and his said wife: and the said John Hart so resided with the said defendant and his said wife at the time of the death of the said Martha Groves" (in 1841), "and remained at the said dwelling house a short time, not exceeding three weeks, after her death."

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On 5th September, 1842, John Hart executed a mortgage of the premises in fee to the lessor of the plaintiff, for securing 100*l.* and interest; which 100*l.* was raised on behalf of and paid to the defendant. It appeared, from the evidence of Alderson, a clerk to the solicitors in whose office the mortgage was prepared, that the defendant having proposed to raise money by this mortgage, Alderson asked him how he became entitled to the property? Defendant answered, through his wife. Alderson asked if W. Hart had left any children. Defendant said he had left one, John Hart. Alderson thereupon said that John Hart was heir at law and must execute the deed. Defendant said John Hart would. When the conveyance was ready for execution, the lessor of the plaintiff, the defendant, and John Hart, came to the office. Alderson read over to them the deed; J. Hart then executed it, and paid the balance of the consideration money (after deducting a previous advance made by the lessor of the plaintiff) to the defendant.

*John Hart had never interfered in the holding, occupation, use, letting, or management of the said hereditaments, or any part of them, nor in the receipt of the rents; nor had the defendant ever paid him any rent or made any acknowledgment.

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Upon these facts it was contended, on the part of the defendant, that he had, ever since 1798, or at all events for a period far exceeding twenty years, enjoyed the hereditaments in question, so that John Hart's right of entry was barred by stat. 3 & 4 W. 4, c. 27, s. 2.

The learned Judge directed the jury to find for the plaintiff, and gave leave to the defendant to move to enter a nonsuit: the Court to be at liberty to draw inferences of fact from the evidence and admissions. A rule nisi having been obtained accordingly,

Sir *J. Jervis*, Attorney General, and *Cole* now showed cause.(*a*) There was no adverse possession against John Hart the mortgagor. Inasmuch as he was above fourteen years old when his father died, it may be inferred from the facts that the widow entered, not as his guardian in socage, but in her own right, and John Hart is her heir at law; *Doe dem. Roffey* v. *Harbrow*, 3 A. & E. 67, note (*a*); *Doe dem. Bennett* v. *Long*, 9 Car. & P. 773. Either this was the case, and therefore the holding of the widow was one on which her own estate began to run on her husband's death, or else she held until her dower was assigned; *Goodtitle dem. Newman* v. *Newman*, 3 Wils. 516, 519; where the counsel for the defendant admitted that the heir had no right to turn the widow out until dower was *assigned to her under c. 7 of [*489 Magna Charta (stat. 9 Hen. 3), the meaning of which enactment is that the widow has a right to forty days' residence even though her dower be assigned, and to residence until it be assigned; which may be done by the infant; 1 Roll. Abr. 147, tit. *Age* (B), Co. Litt. 35 a, Com. Dig. tit. *Enfant* (B 6). But, in the next place, whatever may be the state of the title, the defendant cannot set up any in himself. It would be like the case of a tenant denying his landlord's title. He brought John Hart, the heir at law, to execute the deed of mortgage, which recited John Hart's seisin; and he showed himself to the mortgagee in the light of a mere tenant to John Hart. He therefore falls within the rules established in *Pickard* v. *Sears*, 6 A. & E. 469; *Gregg* v. *Wells*, 10 A. & E. 90, and in *Doe dem. Ogle* v. *Vickers*, 4 A. & E. 782, and *Doe dem. Hurst* v. *Clifton*, 4 A. & E. 809, 813.

Watson and *Welsby*, contrà. The lessor of the plaintiff must recover on the strength of his own title. Assuming that John Hart was at one time entitled to the land, he had not been in possession, as against the defendant, within twenty years. Nor was this any possession of the defendant's wife: it was the defendant's own throughout. There is no question whether possession is adverse or not, since stat. 3 & 4 W. 4, c. 27, s. 2: the only question is, whether the right of the party entering has accrued within twenty years. "The effect of this section is to put an end to all questions and discussions, whether the possession of lands, &c., be adverse or not;" *Culley* v. *Doe dem. Taylerson*, 11 A. & E. 1008, 1015; *Nepean* v. **Doe dem. Knight*, 2 M. & W. 894, 911. In [*490 *Doe dem. Roffey* v. *Harbrow*, 3 A. & E. 67, note (*a*), the jury was left at liberty to conclude, from the whole of the facts, that the widow's possession was not necessarily adverse to her son by a former husband: but that was before stat. 3 & 4 W. 4, c. 27. As to the possession of the widow until her dower is assigned, the construction of stat. 9 H. 3, c. 7, here contended for is entirely new; and the better doctrine is that after the expiration of forty days she is put to her writ of dower.

(*a*) The argument was commenced on April 15th.

But it has also been contended that the defendant is, as it were, estopped, by his own proceedings, from controverting the lessor of the plaintiff's title. It may be that the defendant would be compelled in equity to make a conveyance. But in ejectment the lessor of the plaintiff must recover on the strength of his own title. *Pickard* v. *Sears* and *Gregg* v. *Wells* were cases of chattels: and they apply to plaintiffs, not to defendants. [PATTESON, J. May not the acts done by the defendant amount to an acknowledgment of a tenancy at will?] The doctrine of acts in pais which bind parties by way of estoppel is considered in *Lyon* v. *Reed*, 13 M. & W. 285, 309, where the Court alludes to the uncertainty and peril in which titles would be placed if it were extended, and (referring to Co. Lit. 352 a) observes that such acts should be of a formality equivalent to that of a deed. The lessor does not determine a tenancy at will by merely coming on an estate: only where he comes in such a manner that it would, if not excused, amount to a trespass; *Turner* v. *Doe dem. Bennett*, 9 M. & W. 643. In this
*491] case, the twenty years began to run at all events in 1805, *when John Hart, according to the admission, "left" the premises; which must mean left them for good.

Lord DENMAN, C. J. I think that the Court, exercising the functions of a jury, ought to presume that the defendant was tenant at will to his son-in-law. There is ample evidence to admit such presumption. This is incorrectly likened to a case of estoppel. It is merely a question, which of two suppositions is the most consistent with the facts in evidence. For this purpose, it is immaterial whether the property in dispute be real or personal. Facts may amount to an admission equivalent to admission by parol, which is receivable although it relate to the contents of a deed: *Slatterie* v. *Pooley*, 6 M. & W. 664.

PATTESON, J. I do not say that a party having a legal title to an estate conveys it away by mere equivocal acts which may amount to an admission of title in another. But here the defendant's title rests merely on the Statute of Limitations; and his acts may well amount to an admission that, during the period in question, he was in fact tenant to another.

COLERIDGE, J., concurred.

ERLE, J. The question is, whether the estate of the heir at law is defeated by certain acts in pais relied on by the defendant. The lessor of the plaintiff was clearly entitled, and his title recognised in the plainest way by the defendant. But the defendant's answer is that he occupied as apparent owner for twenty years. To this the reply is, that the
*492] real owner came now and *then and lived with him. If I had been in the place of the jury, I should have held that this showed that the defendant was in reality tenant at will. Rule discharged.(*a*)

(*a*) Reported by H. Merivale, Esq.

The QUEEN *v.* The Inhabitants of LANDKEY. *April* 28.

Reported (with *Regina* v. *The Inhabitants of Widecombe in the Moor*) 9 Q. B. Hilary term, January 20th, 1847.

BRENAN and GALEN'S Case. *April* 29.

The return to a habeas corpus commanding the governor of Millbank prison to bring up two prisoners detained in the said prison, stated that they had been convicted, in the Royal Court of Jersey, of breaking into a shop by night and stealing therein, and had been sentenced by that court to be transported to such place as the Queen in council should appoint; that the Court of Jersey was a court of competent criminal jurisdiction to try and punish the offence; that the Queen in council had ordered that they should be transported to Van Diemen's Land; and that one of the principal Secretaries of State had directed that they should be removed from Jersey to Millbank prison, in order to carry the above sentence and order into effect.

Held, on motion to discharge the prisoners:

That, as the return alleged that the Court of Jersey had jurisdiction to try and punish the offence, and as the sentence of transportation was unreversed, this Court would assume it to be valid, and would not require that the authority of the court to pass it should be set out on the return.

That affidavits could not be used to show that the court of Jersey had no jurisdiction to transport.

That the detention in England was warranted by stat. 5 G. 4, c. 84, s. 17.

That stat. 5 G. 4, c. 84, s. 10, enacting that it should be lawful for the Queen to appoint places of confinement within England for convicts under sentence of transportation, was directory only, and it was not necessary, in order to justify the detention in Millbank prison, that the return should allege that prison to have been duly appointed one of such places of confinement.

ERLE, J., granted a writ of habeas corpus, directed to the governor of Millbank Prison, requiring him to bring up on 22d April, 1847, the bodies of John *Brenan and Henry Galen, detained under his custody, together with the day and cause of their being taken [*498 and detained, to undergo and receive all and singular such matters and things as this Court should, &c.

Return. That, before the said writ came to me (viz. on 23d January, A. D. 1847), John Brenan and Henry Galen respectively were sentenced to be transported from the Island of Jersey to such place as it shall please Her Majesty in council to direct, for the term of seven years, by an act or order of the Royal Court of Jersey, a copy of which follows in these words. The sentence here followed in the original French, to which was added the following translation.(*a*)

(*a*) "A la Cour Royale de l'île de Jersey, l'an 1847, le2 3me Janvier, John Brenan & Henry Galen, lesquels avaient été accusés, en conséquence du rapport du Centenier Chevalier de la paroisse de Saint Hélier, d'avoir, dans la nuit de Mardi 22me à Mercredi 23me Décembre, 1846, ou vers ce temps, rompu une boutique et boulangerie occupées par Madame Anne Gulliver, femme de M. Robert Loveridge et séparée de lui quant aux biens, dans Mulcastre Street, en la ville de Saint Hélier, de s'être ensuite introduits dans la dite boutique, et d'en avoir volé un gâteau dit "sweet cake," la propriété de la dite Madame Anne Gulliver, ou d'avoir aidé, assisté et participé à la dite rupture et au dit vol," &c., (stating a plea of Guilty, and subsequent pro

*473] *Lord DENMAN, C. J., in this term (May 8th), delivered the judgment of the Court.

Without entering into a lengthened examination of the decisions on the questions raised, we think it enough to say that the imputation cast on the plaintiff by the words set forth in the first count appears to us to reflect on the plaintiff in his professional character; and that cast on him in the second count does not so affect him within the meaning of the cases.

The consequence is, as the damages were taken on the two jointly, that a venire de novo must be awarded, that the damages may be assessed on the good count only. Rule absolute for a venire de novo.(a)

(a) See *Le Fanu* v. *Malcomson*, 1 H. L. Ca. 637.

DOE dem. PLUMER v. MAINBY. *April* 15.

Premises were demised under a written agreement, dated 4th August, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of 55*l.* payable half-yearly, "except the *last half year*, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear." Tenant "to allow the landlord, or incoming tenant, *in the last year*, to enter on 1st May, to make fallows, and carry out the manure," for which compensation was to be paid, &c. Tenant to have "the use of the barns for stacking and threshing the crops of *the last year* till the 1st day of May after the tenancy."

Held, that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year.

Consequently that the tenancy was determined by a notice dated 24th March, 1846, to quit at Michaelmas that year.

EJECTMENT for messuages and land in the parish of Lindfield, Sussex. Demise, 10th December, 1846.

On the trial, before WILDE, C. J., at the Sussex Spring Assizes, 1847, it appeared that the lessor of the plaintiff, being mortgagee of the premises, entered into the following agreement, in writing, with the defendant.

*474] "Terms and conditions for letting Townland farm and *premises, and land called the Lime Pits, in Lindfield, in possession of Mr. John Plumer as mortgagee, to the undersigned tenant. The tenant has purchased the present crops, and feeding of the aftergrass, and half dressings and seeds sown, now taken possession of by W. Plumer, under a writ of possession, for the sum of 150*l.* The tenancy to be from year to year from Michaelmas next, at the net yearly sum of 55*l.*, payable half yearly at Lady Day and Michaelmas, except the last half year, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear, any law or usage to the contrary notwithstanding. The tenant to dress the arable and meadow lands in due course of husbandry, so as to keep the same in good heart and condition: to allow the landlord, or incoming tenant, in the last year, to enter on the first

day of May, to make fallows and carry out the manure, for which a compensation for rent and taxes, and also for manure in the yard or on the mixen on the premises, shall be allowed, according to the custom of the country. He shall keep the houses, buildings, fences, gates and trees in tenantable repair, being allowed rough timber by the landlord upon or within three miles of the premises. The tenant shall not underlet any part of the premises, or use or suffer the same to be used as a beer shop, and shall allow the landlord at all seasonable times to enter and view the condition of the premises; and, in all respects not herein mentioned, the tenant shall cultivate the farm according to the custom of the country, in like manner as if the cultivation and management thereof were herein particularised: and to be allowed the use of the barns for stacking and *threshing the crops of the last year till the first day of May after the tenancy, and the manure so made to be paid for according to the custom of the country. And the said farm and premises are so let accordingly. Witness our hands the 4th August, 1845. [*475

"D. STEDMAN, agent for Mr. PLUMER.
"J. H. MAINBY."

Under this agreement, defendant came into possession: and, on 26th March, 1846, he was served with a notice to quit at Michaelmas, 1846. It was contended at the trial, on his behalf, that the terms of the agreement necessarily imported that the tenancy was to last beyond the first year. WILDE, C. J., held that the notice to quit determined the tenancy at Michaelmas, 1846. Verdict for plaintiff.

Shee, Serjt., now moved for a new trial on the ground of misdirection; and contended that, taking the whole agreement together, it was not intended that the landlord should have power to determine the tenancy at the end of the first year. The words "in the last year" import that more than a year's tenancy was intended; for instance, the rent for the "last half year" is to be paid on the first of August in that year, and to be deemed then due: if this applies to the first year, the tenant was liable to be turned out, on failure of payment of rent, before he could have received any benefit from the farm. Again: in the "last year" the tenant is to allow the landlord or incoming tenant to enter on the first day of May to make fallows: it cannot have been contemplated that this should take place in the first year, the tenancy having commenced at *Michaelmas. The same intention is evident from the rest of the stipulations. [*476

Lord DENMAN, C. J. These observations only show what was contemplated by the parties as possible or probable; not any binding arrangement. Certain contingencies are provided for, in case the tenancy should last for more than one year. But the agreement does not, therefore, create a tenancy necessarily for more than one year.

PATTESON, WIGHTMAN and ERLE, Js., concurred. Rule refused.(a)

(a) Reported by H. Merivale, Esq.

At the Royal Court of the Island of Jersey, the year 1847, the 23d day of January, John Brenan and Henry Galen, who had been accused, in consequence of the report of the Centenier Chevalier of the parish of St. Helier, of having, in the night of Tuesday the 22d and Wednesday the 23d December, 1846, or about that time, broken a shop and bake-house occupied by Madame Anne Gulliver, wife of Mr. Robert Love-
*494] ridge, and *separated from him as far as relates to goods, situate at Mulcaster Street, in the town of St. Helier; of having afterwards introduced themselves into the said shop, and of having stolen from it a cake, called sweet cake, the property of the said Madame Anne Gulliver, or of having aided, assisted or participated in the said breaking or the said stealing, and who have pleaded Guilty to the said charge, as appears by an act of the Court, dated 2d January, 1847, being called upon, at the instance of the Advocate General of the Queen stipulating the office of Procurator General to the Queen, to receive sentence in conformity with the said act; after the said John Brenan and Henry Galen have been heard in mitigation by means of their Advocate, the Court, conformably with the opinion of the said Mr. Advocate General of the Queen stipulating the office of Procurator General of the Queen, and considering their being in the state of relapsed criminals, has condemned them for punishment of their crime to be transported to such place as it shall please her thrice Excellent Majesty in council to order, for the term of seven years, and all their goods, moveables and hereditaments, if they have any remaining, to be acquired and confiscated to the benefit of Her said Majesty, or of the lord to whom they belong. And they are sent back to prison until such time as the good pleasure of Her Majesty be known touching the said transportation; to which effect the registrar is ordered to transmit an authentic copy of the present act to the clerk in waiting of the Privy Council of Her Majesty.

"(Signed) CHARLES DE ST. CROIX, Registrar."

*495] *The governor then certified that the said Royal Court of Jersey, at the time of the commission of the said offence and the passing of the said sentence, was, by the law of Jersey, a court of competent criminal jurisdiction to try and punish the said offence:(*a*) And that afterwards, and on 27th of February, 1847, the following order was made by her Majesty in council.(*b*)

The order was then set out. It recited the "Act" of the Royal Court sentencing the prisoners to transportation: "and that the said Royal

ceedings up to judgment); "la Cour," &c., "les a condamnés, pour punition de leur crime, a être déportés à tel lieu qu'il plaira à Sa Très Excellente Majesté en conseil d'ordonner pour le terme de sept années,"&c.

(*a*) See First Report of the Commissioners on the Criminal Law of the Channel Islands, pp. xiii, xxi.

(*b*) The original return omitted the order in council, and the order of the Secretary of State. On April 26th, the Attorney General, Sir *J. Jervis*, citing *Leonard Watson's Case* (9 A. & E. 731, 762,) moved to have the return amended by adding these documents; which was granted.

Court have proceeded in this matter as far as they are authorised to do by the laws of the said island, and the said John Brenan and Henry Galen have been sent back to prison until Her Majesty's pleasure should be known thereon;" and it then ordered "that the said John Brenan and Henry Galen be transported out of the island of Jersey to Van Diemen's Land, or some one or other of the islands adjacent thereto, for the term of seven years, the period of their transportation to commence from the 23d day of January, 1847."

The return then certified that the Right Honourable Sir George Grey, Bart., one of her Majesty's principal secretaries of state, in order to carry the said sentence of the said Court and the said order in council into effect, afterwards, to wit, on 26th March, 1847, authorised and directed the said John Brenan and Henry Galen to be removed from the prison of the said Royal Court of the island of Jersey to the Millbank prison, to be there delivered to the governor of the said prison; *and [*496 that the said Sir George Grey, in order to carry the said sentence and order into effect, afterwards, to wit, on the said 20th March, 1847, authorised and required the governor of the said prison to receive the said John Brenan and Henry Galen into his custody in the said prison, by the following order in writing under his hand:—

"1708. Whitehall, 20th March, 1847.

John Brenan,
Henry Galen,
George Chinel,
George Roborough,
Michael Kenton.

"Sir: I am to desire and do hereby authorise you to receive into the Millbank Prison the prisoners named in the margin, who will be sent to you from the gaol at Jersey."

The return then certified that the governor afterwards, to wit, on 29th of March, 1847, received into the Millbank prison, and kept in his custody there, the said J. Brenan and Henry Galen, by reason of the premises, and by virtue of and in obedience to the said order of the said Sir George Grey.

Crowder and *Lush* now moved(*a*) that the prisoners should be discharged. They referred to an affidavit, in which it was stated that their imprisonment was effected by virtue of a sentence passed by the Bailli of the Royal Court of Jersey, &c., "and that there is not in the said island any law by charter, ordinance, order in council or statute, which empowers the said Royal Court to pass sentence of transportation beyond the seas."

Sir *J. Jervis*, Attorney General, objected to the reference to an affidavit against the return; citing *In re Clark*, 2 Q. B. 619, 633–635.

**Crowder*. The affidavit is to the effect that the Court has no [*497 power to sentence to transportation: and the return does not show such power. [Lord DENMAN, C. J. That would be an objection to the return, independent of affidavits.] It is sufficient, then, for the prisoners to assume that there is no such power, inasmuch as none is set

(*a*) Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

out: but, if this were not sufficient, then the prisoners must be admitted to show that it does not exist. If the return had certified that the power existed, the question might have arisen whether affidavits could be used to contradict it: but it is a different question whether they may not be used to establish an affirmative when the return is silent. At all events, it is clear this return would have been bad, if it had not been amended by the introduction of the order in council and order of the secretary for the Home Department. But these orders themselves must rest on a valid foundation. In *Leonard Watson's Case*, 9 Q. B. 733, 762, it was held necessary to amend the return by inserting a Canadian statute which was the foundation of the jurisdiction claimed. In the same manner, the authority to pass the original sentence should have been specified here, to sustain the orders. And the order in council evidently refers to the judgment of the Jersey Court.

That the power to transport does not exist in Jersey is evident independently of affidavits. Transportation is not a common law punishment, 4 Hawk. P. C. 473 (ed. 7), b. 2, c. 48, s. 16: nor, if it were, does the common law extend to Jersey. The "Grand Coustumier" of Normandy, which is the foundation of the law of Jersey, contains no
*498] such punishment. [PATTESON, J. *That is a question which cannot be inquired into here. The law of Jersey is in our courts the law of a foreign country, and to be proved by evidence.] If so, the greater is the necessity for its being set forth in the return that the sentence was according to law; since the validity of the detention must wholly depend upon the power which the law of Jersey gives to transport. [WIGHTMAN, J. The complaint is that the parties are detained in England.] Their detention in England is only warranted by Sir George Grey's direction; and that is referred, by the return, to the prior sentence. The legality of the prior sentence must, therefore, come in question in discussing the legality of the imprisonment; consequently, either the legality ought to appear on the return, in order that it may be traversed, or, if it does not so appear, the defendants must have an opportunity of showing aliundè that the detention was nôt legal. Nor is the case carried farther by the order of Sir George Grey authorising the removal of the prisoners to Millbank. The recital in stat. 5 G. 4, c. 84, s. 17, on which Sir George Grey's power to make such removal is founded, shows that the enactment (so far so as it is here applicable) only relates to cases where offenders "are liable to be punished by transportation" "by the laws in force in some parts of His Majesty's dominions not within the United Kingdom." No such laws are shown to exist in Jersey. In the next place, the power given by that section is, to imprison such a convict temporarily in any place of confinement "provided under the authority of this act;" that is, places appointed by the Crown by warrant, under sect. 10, for the confinement of persons under sentence of transportation. But it is not shown on this return that

*Millbank Prison is such a place. Nor can it be contended, as in *Leonard Watson's Case*, 9 Q. B. 731, that the imprisonment was justified as a necessary exercise of power to detain convicts in their transit; for there is no averment of such necessity. [*499

Sir *J. Jervis*, Attorney General, Sir *D. Dundas*, Solicitor General, *M. D. Hill*, and *Waddington*, contrà. The fallacy of the argument on behalf of the prisoners consists in confounding the functions of this Court, in deciding on the return to a habeas corpus, with those which it possesses in the case of a writ of error. If that argument were correct, the prisoner must be released on habeas corpus in every case where a court of competent jurisdiction has given an erroneous judgment. The case of *Campbell* v. *The Queen*,(a) where judgment was wrongly given on two counts, might in the same manner have been disposed of on habeas corpus. Whether or not the power of sentencing to transportation is possessed by the Criminal Court of Jersey is therefore no question here, any more than the power to imprison was in question in *Carus Wilson's Case*, 7 Q. B. 984. It may be urged that no appeal can otherwise be had from the decisions of that Court: but the same is the case with respect to the Criminal Courts of Scotland: and yet such a sentence, passed by a Scotch Court, would not be inquired into on habeas corpus; *Bârne's Case*, 2 Roll. R. 157, cited in *Rex* v. *Suddis*, 1 East, 306, 309. (As to the point of jurisdiction they were stopped by the Court.)

*The remaining question is, whether that part of the return is sufficient, which sets out the letter of Sir George Grey, authorising the Governor of Millbank Prison to receive the prisoners. But let it be assumed that the statute does not apply, and that Millbank was an unauthorised place of detention: the place of imprisonment is not of the substance of the return. Suppose a court of competent jurisdiction had authorised the detention of a criminal in Middlesex; the fact of his being detained in Essex would not authorise the Court to interfere. But the statute applies. These prisoners are within the words of stat. 5 G. 4, c. 84, s. 17, "convicts adjudged to transportation by any court or judge in any part of His Majesty's dominion not within the United Kingdom." They may therefore be detained in any place of confinement "provided under the authority of this act." But then it is contended that these are only places appointed by warrant under sect. 10, and that Millbank Prison does not appear by the return to be such a place. But the removal of convicts to Millbank Prison is expressly authorised by the act for regulating that prison, 6 & 7 Vict. c. 26: and sect. 14 of that statute refers to stat. 5 G. 4, c. 84. Therefore, if it be necessary, those acts will be incorporated with each other by reasonable construction. But a sufficient general answer is given to this objection by the judgment of the Court on the last head of objection in *Leonard Watson's Case*, 9 A. & E. 785. [*500

(a) Exchequer Chamber (Error from Q. B.): decided Michaelmas Vacation, 1847.

Crowder, in reply. In *Barne's Case*, 2 Roll. R. 157, and in *Rex* v. *Suddis*, 1 East, 306, the returns justified under the law of England; and
*501] in the latter case the return expressly *referred to the article of war which authorised the sentence of transportation. This return sets out the sentence of a foreign court, and does not even allege the legality of the sentence. If its illegality appeared on the face of the return, could it then be said that the prisoners would not be entitled to their discharge? If the sentence had imposed torture, or any other punishment unauthorised by our law, would it be assumed that such punishment was authorised by the law of Jersey? The detention of the prisoners in any prison in England cannot be justified under stat. 5 G. 4, c. 84, s. 17, without assuming that the Court of Jersey was competent to transport them, which is the very thing in question: and, even after this general assumption, the detention in Millbank Prison is illegal, for it is not shown to be one of the appointed places of confinement for persons sentenced to transportation, under sect. 10 of that statute; and stat. 6 & 7 Vict. c. 26, s. 12, authorises the removal to Millbank Prison of such prisoners only as are in some other prison in England.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (May 8th), delivered the judgment of the Court.

The return of the Governor of the Millbank Penitentiary to a writ of habeas corpus, commanding him to bring these two persons before us to be discharged, is, that he has received the certificate of the Greffier of the Royal Court of Jersey, stating that they were both convicted of
*502] burglary(*a*) in that Court, which is a *competent Court to try and to punish for that crime, and by that Court sentenced to be transported from Jersey to such place as Her Majesty in Council should be pleased to order. The return further states an order made by Her Majesty in Council, directing the transportation of the said two convicts from Jersey to Van Diemen's Land or some other island; and, further, Sir G. Grey's warrant for removing them from Jersey to the said prison, in order to carry the said sentence into effect; and his desire addressed to the Governor of the prison to receive them.

No objection was made to the return on the ground that it did not show jurisdiction in the Court to try and punish for the crime of burglary: but it was said to be bad for not showing that the Court had power to punish by transportation.

We think, however, that, the Court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the Court to pass the sentence to be set out by the gaoler upon

(*a*) Of breaking into *a shop* by night, and stealing therein. It seems that the crime of burglary is not known in the law of Jersey: see First Report of the Commissioners, &c., p. xii. But the offence set forth in the Act of the Royal Court is a crime by the law of the Island.

the return, we are bound to assume, primâ facie, that the unreversed sentence of a Court of competent jurisdiction is correct; otherwise we should, in effect, be constituting ourselves a Court of appeal without power to reverse the judgment.

The power of detaining persons, so convicted, in prison in this country, the statute 5 G. 4, c. 84, s. 17, does not expressly give: but the recital shows the occasion of passing the act:—That, by the laws in force in some parts of Her Majesty's dominion, not within the United Kingdom, offenders were liable to be punished by transportation, and there might be no means for *transporting them without first bringing them to England; and the seventeenth clause enacts "that, whenever any convict adjudged to transportation by any court or judge in any part of His Majesty's dominions not within the United Kingdom," "shall be brought to England in order to be transported, it shall and may be lawful to imprison any such offender in any place of confinement provided under the authority of this act." No words could have more clearly intimated that the fact of a sentence having been passed by such Court founds the right to detain, and that the validity or regularity of the sentence is not to be called in question. Even if that sentence is erroneous, this court cannot set it aside or inquire into its propriety, or deny it the effect which the law assigns to any sentence. [*503

But it was said that the detention did not appear to be in any of the particular prisons to be appointed under stat. 5 G. 4, c. 84. But we consider these enactments as directory, and that they do not interfere with the power asserted in general terms by the seventeenth section. The nonobservance of these particulars may expose officers to censure: but it does not require the discharge of the criminal convicted by a competent Court within Her Majesty's dominions of a crime well known to our laws, condemned to a punishment equally known to them, and brought into this country under a sentence of a Court within that part of Her Majesty's dominions where the crime was committed.

The prisoners were remanded.(*a*)

(*a*) Reported by H. Merivale and H. Davison, Esqrs.

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*DALE *v.* POLLARD, POPPLEWELL, ANDREW, and WADDINGTON. *April* 30. [*504

Plaintiff was summoned before two justices for refusing to pay a sum under 10*l*., being his proportion of a church rate, laid by the churchwardens with the consent of the minority of a vestry meeting, but refused by the majority. The justices asked his attorney if he had anything to say against the payment. The attorney said, that he should not try the validity of the rate before the justices, but give them a written notice; and should bring an action against the justices if they enforced the rate. He then, before the making of the order, served the justices with a written notice that the plaintiff protested against the church rate as unscriptural, &c.; that he should not contest the validity of the rate in the ecclesiastical courts; and that he should commence actions in the courts of common law against the justices and all other persons concerned therein for all acts and proceedings connected with the

rate which he should be advised were illegal. The justices made an order for payment, knowing, at the time, that the plaintiff intended to dispute the right of a minority to impose a church rate.

Held, that these facts, taken together, showed that the validity of the rate was disputed, and notice thereof given to the justices, under stat. 53 G. 3, c. 127, s. 7. And, the justices having made a warrant founded on the order, under which warrant plaintiff's goods were distrained, plaintiff recovered in replevin.

ON the trial of this cause, at the York Summer Assizes, 1842, a verdict was found for the plaintiff, damages 3*l.* 3*s.*, subject to a special case, on which the Court was to draw such inferences as they should think a jury ought to draw; with liberty to turn the case into a special verdict, if the Court should so order, with such findings as they should direct to form part of it: damages being assessed contingently for the defendants.

The special case set out the pleadings. The declaration was in replevin for taking account books, &c.

Cognisance as the bailiffs of John Plumbe Tempest and others, justices for the West Riding of Yorkshire. That plaintiff, before the time when, &c., and before the making of the rate, &c., after mentioned, and thence continually to the time when, &c., was an inhabitant of the township of Bradford, in the parish of Bradford, in the West Riding, and the occupier of the dwelling house in which, &c., the same being situate in the said township and parish, and by law rateable for and towards the necessary expenses and service of the parish church. That

*505] heretofore, and while plaintiff was such *inhabitant, &c., to wit, 14th May, 1841, a certain church rate was made in respect of the repairs of the said parish church and other lawful purposes, in which plaintiff was duly rated in a sum below 10*l.*, to wit, 1*s.* 5*d.*, the validity of which rate had not, before or at the respective times of making and hearing the complaint, and of the making and issuing the warrants and order after mentioned, or before or at the said time when, &c., been questioned in any Ecclesiastical Court. That afterwards, &c., to wit, on, &c., the said Pollard and Popplewell, then, and from thenceforth until and at the time when, &c., being the churchwardens of the parish church of Bradford, and whose duty it was as such churchwardens to collect and receive the said rate, duly gave notice to plaintiff, and demanded of him the said sum of 1*s.* 5*d.*, which he refused and still refuses to pay. Whereupon afterwards, &c., to wit, on, &c., Pollard duly made his complaint to Lamplugh Wickham Hird, Esq., a justice of the peace for the West Riding, of the said refusal; the said justice not being in any way interested, &c. That the said justice thereupon duly, according to the form of the statute, &c., made his warrant requiring plaintiff to appear before him at the court house at Bradford, on, &c., next ensuing, to show cause for his refusal. That plaintiff appeared at that time before the justices named in the cognisance (denial of their being interested, &c.), who examined upon oath into the merits of Pollard's complaint, and thereupon made their order, which recited the

complaint, warrant and appearance, and, after finding that the said sum of 1*s.* 5*d.* was justly due from plaintiff to the said churchwardens, directed him to pay it with 17*s.* costs. The *cognisance then alleged the service of the order, refusal to pay, and warrant of distress under the hands and seals of the same justices, and distress, &c. [*506

Pleas in bar: 1. De injuriâ. Issue thereon.

2. That, at the time of the said examination by the said justices, and before the making of the rate, to wit, on, &c., "he the said plaintiff disputed the validity of the said supposed rate in the said cognisance of the defendants mentioned, and then gave notice of his so disputing the validity of the said supposed rate" to the said justices. Verification. Replication: That plaintiff did not dispute the validity of the rate, or give notice, &c., as in the plea alleged. Issue thereon.

The case then set out the facts which appeared on the trial; viz. a monition of the Consistory Court of the Archbishop of York to the churchwardens Pollard and Popplewell to take the necessary steps for putting the church of Bradford in repair, and to call a vestry for the purpose of making a rate towards such repair, &c. That the vestry meeting was accordingly called, and holden on 6th May, 1841: the proceedings of which, as entered in the "Town Book," were to be treated as part of the case. From these entries it appeared that, the monition having been read, the defendant Popplewell, as senior churchwarden, proposed a rate of 383*l.* 4*s.* 2*d.* to be laid on the parish towards the necessary repairs and expenses of the parish church, specifying the items; "which was to be borne by each township in certain proportions: viz. the township of Bradford 102*l.* 3*s.* 9¼*d.*" (four fifteenths), "and nine other townships their several shares: and that one halfpenny in the pound was to be assessed on property rateable for the relief of the poor in the township of Bradford to raise *such proportion." This motion being seconded by the defendant Pollard, an amendment, [*507 "That there be no church rate for the parish of Bradford for the current year," was proposed and seconded. The original proposition, having been put to the meeting, was rejected. The chairman having, at the request of the churchwardens, asked whether there was any other proposition which the meeting wished to make in lieu of the church rate proposed by the churchwardens, a proposal was made and seconded for a voluntary subscription, and carried by a considerable majority. The churchwardens refused this course, and gave notice that they would lay a rate on their own authority with the consent of the minority. They accordingly made a rate for the amount required, directing that it should be paid by the several townships to the amounts before specified; and that one halfpenny in the pound should be assessed on property rateable to the relief of the poor in Bradford township. This rate was signed by the vicar, churchwardens and others, being a minority of the meeting, and a protest was made against it, and numerously signed. The case

then set out the assessment, by Popplewell and Pollard, on the township of Bradford, for the purpose of raising the above sum of 102*l.* 3*s.* 9½*d.*, at one halfpenny in the pound, and on the plaintiff of 1*s.* 5*d.*, as an occupier therein. The parish of Bradford consists of ten townships, named in the case, of which the township of Bradford is one. Bradford township chooses churchwardens for itself; and most of the other townships choose churchwardens or chapelwardens: but the parish church is situated in the township of Bradford; and the churchwardens of that
*508] township have always acted and been treated as *churchwardens of the whole parish in respect (inter alia) of the laying parish rates, &c.

The above alleged rate was never questioned in any Ecclesiastical Court, and, if otherwise legal, was apportioned among the various townships according to the ancient and invariable usage of the parish:(*a*) but no evidence was given of the proper method, customary or other, of assessing on the several inhabitants of the particular townships the sums payable respectively by such townships under such apportionments.

The churchwardens, on 17th July, 1841, duly gave the plaintiff notice of the said rate, and demanded payment, which he refused: upon which the complaint was made and the plaintiff summoned as stated in the pleadings. He appeared on 21st July before the justices, who examined, &c., and thereupon (assuming the rate to be valid, and that notice of the validity of such alleged rate, or of the plaintiff's liability to pay the same, being disputed was not given to the justice in conformity with stat. 53 G. 3, c. 127, s. 7,) duly made the order set out in the pleadings. The minutes of the vestry meeting were read to the plaintiff, then attending, and his proportion of the rate proved, &c.

"The said justices asked the attorney of the plaintiff, who attended with him on his behalf, if he had anything to say against payment of the 1*s.* 5*d.*: to which the attorney answered, 'The course that I intend to pursue is, to put in a written notice:' when the chairman of the justices said to him, 'I suppose that is to dispute the validity of the rate:'
*509] to which the attorney *answered, 'No, we shall not dispute the validity of the rate: we shall not try the validity of the rate before these justices; but we will merely give a written notice.' The attorney also said he would bring an action against the magistrates if they enforced the rate. The attorney also then, before the making of the said order, served the justices with a written notice in the following words, signed by the plaintiff. "I give you notice," &c., "first, that I protest against the church rate alleged to have been laid for the parish of Bradford, as being an attempt to impose an unscriptural and oppressive tax upon all denominations of Christians for the benefit of one denomination only. Secondly, that I shall not contest the validity of the

(*a*) As to this custom, see *Stead* v. *Heaton*, 4 T. R. 669; *Rex* v. *The Chapelwardens of Heworth*, 12 East, 556; *Regina* v. *Thomas*, 3 Q. B. 589; *Regina* v. *Pickles*, 3 Q. B. 599, note (*a*).

said rate in the Ecclesiastical Courts. Thirdly, that I shall commence actions in the Courts of common law against you and all other persons concerned therein, for all acts and proceedings, connected with the said rate, which I shall be advised are illegal."

The justices, at the time of the said attendance, and of the said notice being served, and before and at the time of the said order being made, knew that the plaintiff denied and disputed, and intended to deny and dispute, the right of a minority to impose a church rate against the vote of a majority.

After setting out some other evidence, immaterial to the question ultimately decided, the case stated that the order described in the cognisance was served on the plaintiff, and payment of the 1*s.* 5*d.* and 17*s.* demanded and refused; and that the plaintiff's goods were distrained under a warrant; in respect of which taking, the action was brought.

Questions for the opinion of the Court.

*1 and 2, not now material. 3. Whether the verdict on the last issue should be found for plaintiff or defendants. 4. Whether the above case is to be turned into a special verdict, and what facts should be found and inserted therein. [*510

T. F. Ellis, for the plaintiff. As to the third question: the plaintiff is entitled to judgment on the last issue, as he had given notice to the justices that he intended to dispute the validity of the rate, in the sense in which those words are used in stat. 53 G. 3, c. 127, s. 7. His attorney informed the justices that an action would be brought against the magistrates if they enforced the rate: this is to dispute its validity; *Rex* v. *The Chapelwardens of Milnrow*, 5 M. & S. 248. The question only is, whether he satisfies the justices that there is a bonâ fide intention to dispute; *Rex* v. *Wrottesley*, 1 B. & Ad. 648. The only argument on the other side arises from a literal interpretation of one part of the words used by the plaintiff: but it is evident, from the context, that his attorney, by the expression "we shall not dispute the validity of the rate," meant merely "we shall not dispute it before you (the justices), because our intention is to dispute it elsewhere." The plaintiff could not consistently dispute it before the Ecclesiastical Court, as a prohibition would have lain; because, if the objection was valid, there was no rate; *Burder* v. *Veley*, 12 A. & E. 233; *Veley* v. *Burder*, 12 A. & E. 265, 312, 314. Besides, this was a customary rate; *Regina* v. *Thomas*, 3 Q. B. 589: that Court had therefore no jurisdiction. (The arguments on the other questions *are not reported, as the Court decided ultimately upon this.) [*511

Cowling, contrà. This was not such a disputing the validity of the rate as ousted the justices of their jurisdiction. The plaintiff objected to all rates, as "unscriptural and oppressive," &c.; that is not a legal objection to the validity of a particular rate, such as the act intends should be decided before another tribunal. If a party expressly says,

as here, that he does not intend to go before the Ecclesiastical Court, that implies that he submits to the jurisdiction of the justices: and why should it be held that the defendant was compelled to proceed in the Ecclesiastical Courts, when, if he had done so, he would have found no party there to answer him? *Rex* v. *The Chapelwardens of Milnrow* by no means goes to the extent contended for. In that case, Bealey gave as his reason for threatening an action, "that he had no right to pay, because he had no claim to or seat in the chapel." That was contesting the validity of the rate on a specific ground which might be tried; not a mere contingent threat of bringing an action, if advised to do so. *Rex* v. *Wrottesley* is in the defendants' favour: and so is *Regina* v. *St. Clements*, 12 A. & E. 177. [WIGHTMAN, J. The plaintiff's meaning probably was, that he should dispute the validity of the rate, but not in the Ecclesiastical Courts, because a prohibition would lie.] Taking him to have meant this, his language was evidently open to misconstruction; and the justices might reasonably suppose that he did not mean to try its validity elsewhere at all. *[PATTESON, J. It is found in the case that they knew he meant to dispute the right of a minority to impose the rate; that is, its validity.] The magistrates at all events, on this construction, could not do otherwise than go on; and the Court will consider that, if they were misled by an ambiguity of language, the fault lay with the plaintiff.

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Lord DENMAN, C. J. I think it not impossible that the legislature, in passing stat. 53 G. 3, c. 127, s. 7, may have intended that all questions arising on rates below 10*l.* should be decided by the justices, unless the party gave notice of his intention to dispute their validity in the Ecclesiastical Court. But that is not the language of the act. And certainly, if it were, this difficulty would follow, that, in order to exempt himself from the jurisdiction of the justices, a party must give notice of an intention to dispute in the Ecclesiastical Court, although perfectly aware that a prohibition would ensue. At all events, as the clause stands, the jurisdiction is taken away wherever the validity is disputed and notice thereof given to the justices. Here we have, first, a general declaration that the party will not try the validity before the justices, and then a written notice that he will not dispute in the Ecclesiastical Court, but that actions will be brought. The whole, taken together, shows to my mind that his intention was to dispute in a legal course the validity of the rate: and it is found that the justices knew this.

PATTESON, J. This a question of fact on all the evidence as set out in the special case: namely, whether the plaintiff disputed the validity of the rate, and gave notice "thereof." The question is not in what way or *before what court he meant to dispute it. The words "I shall not contest the validity of the said rate" must not be taken otherwise than in connection with what precedes and follows, which points their meaning to a dispute before the justices only. The written notice,

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though not drawn up with the care which was desirable, shows, upon the whole, what his intention was: and it is found that the justices *knew* that he meant to dispute a particular question affecting the validity of the rate.

WIGHTMAN, J. The decision in *Rex* v. *Wrottesley*, 1 B. & Ad. 648, was, that there must be a real intention to dispute, not a mere statement of such intention. That difficulty is got over here by the statement in the case, that the justices knew that the intention was bonâ fide. The only question is, was it an intention to dispute the validity of the rate, within the meaning of the statute? Undoubtedly the written notice is not very formal: but it is evident, upon the whole, that its meaning is, that the plaintiff intended to dispute such validity, not in the Ecclesiastical Court, but by prohibition if the other side attempted to try the question there, by action if the justices chose to issue a warrant.

ERLE, J. In *Rex* v. *Wrottesley* there was a mere declaration of an intention to dispute the validity: no action against the justices was threatened; and the decision was that the case should be sent back to the justices. Judgment for plaintiff.

The counsel agreed that the jury should be considered as discharged as to the other issue.(*a*)

(*a*) Reported by H. Merivale, Esq.

The QUEEN *v.* SHIPPERBOTTOM. *May* 1. [*514

An order in bastardy commencing "whereas S." (the putative father) "having been duly served with the said summons," &c., "*and now appearing* in pursuance thereof, proceeded as follows:

"And, it being now proved to us, in the presence," &c., "of *the attorney attending on behalf of* S." (that the child was born a bastard, &c.): "and we having, in the presence, &c. "*of the said attorney*," &c., "heard the evidence of" (the mother), "and no evidence having been tendered on behalf" of S.: It then adjudged S. to be the putative father:

Held sufficient, since stat. 8 & 9 Vict. c. 10.

Held, also, that the form of order given in the schedule to that act does not require it to be set out that the evidence was given on oath.

THE following order of two justices of the peace for the borough of Bolton, in the county of Lancaster, had been brought up by certiorari.

The order, after a recital, that Sarah M'Carnon, single woman, residing at Great Bolton within the said borough, did, on 21st January, 1846, having been delivered of a bastard child within twelve months prior thereto, make application for a summons to be served on one Nathaniel Shipperbottom, &c., proceeded: "And, whereas, the said N. S. having been duly served with the said summons within forty days from this day, and now appearing in pursuance thereof, and the said Sarah M'C. having now applied to us, the justices in petty session assembled, for an order upon the said N. S. according to the form of the statute in such case," &c.: "and it being now proved to us, in the presence and hearing

risk of boats, so far as ships were liable thereto, excepted, to plaintiffs,
*518] or their assigns, on *paying freight for the said goods, &c. That in consideration of the premises, &c., defendant promised plaintiffs safely to carry and deliver the goods, the act of God, &c. (enumerating the exceptions above mentioned) excepted. That, although defendant then took, accepted and received the goods of plaintiffs for the purpose aforesaid, and although the ship afterwards, &c., safely arrived in the port of London; and, although a reasonable time for defendant to have delivered the goods to plaintiffs had, at the commencement of this suit, long elapsed; and, although defendant had not been prevented from safely carrying and delivering the whole of the said goods, as aforesaid, by the act of God, the Queen's enemies, fire, or any danger or accident of the sea, rivers, or navigation of any nature or kind whatsoever; and, although defendant had delivered a part of the goods, &c.; and, although plaintiffs had always been ready and willing to pay defendant the freight, &c., of which defendant had always had notice; yet defendant had not safely carried and delivered the residue of the goods, but had wholly failed and neglected so to do, and had behaved and conducted himself so carelessly with respect to the carrying and delivering the residue of the goods, that by reason thereof the residue of the goods had become and were wholly lost to plaintiffs.

Plea 5. That, after the residue of the goods in the declaration mentioned had been shipped, as therein alleged, and whilst the same and part thereof were on board the ship, and before any breach of every promise in respect thereof, to wit, on, &c., the ship, in the course of her voyage to London, did call and was at Cadiz, to wit, in the province of Andalusia and kingdom of Spain, and according to and within the meaning of the terms upon which the residue of the goods was
*519] *shipped as in the declaration alleged; and that the residue of the goods was then within the jurisdiction of the officers of the customs at Cadiz aforesaid, and also within the jurisdiction of a certain court and tribunal, to wit, the tribunal of the subdelegation of the revenues of the province of Andalusia aforesaid in the kingdom of Spain, then held at Cadiz, to wit, by and before a certain person, to wit, one Signor Don Manuel Lanchez Ocana, the intendant subdelegate of the revenues of the said province, and then being the judge of and in the said court. That, whilst the ship was so calling and was at Cadiz, and whilst the residue of the goods and every part thereof were within the jurisdiction of the said Court, and of the said officers of customs at Cadiz, and before any breach of promise by defendant in respect thereof, to wit, on, &c., the residue of the goods was then by the proper authorities having jurisdiction in that behalf, to wit, the officers of the customs at Cadiz, and according to the law of Cadiz, and of the kingdom of Spain, lawfully taken out of the ship, and the care and custody of defendant, and landed, and examined and detained, to wit, for the space of thirty

days, to wit, at Cadiz aforesaid, and within the jurisdiction of the said Court, and against the will, and without the consent, neglect or default, of defendant, or his agents or servants in that behalf, on a certain charge, to wit, on a charge of suspicion that the same were contraband according to the law of Cadiz and of the kingdom of Spain; and which last mentioned charge was then, to wit, on, &c., and duly and according to the law of Cadiz and the kingdom of Spain, preferred in the before mentioned Court and tribunal, held as aforesaid by the proper officer in that behalf, to wit, by one Don Juan Quijada, lieutenant of custom house officers at *Cadiz aforesaid. That afterwards, and whilst the residue of the goods was at Cadiz and so detained as aforesaid, [*520 and within the jurisdiction of the said Court, to wit, on, &c., the same residue of the goods and every part thereof were and was, by a decree and order of the said Court, and of the said Judge thereof, then duly made, according to the law of Cadiz and of the kingdom of Spain, declared to be, and was and were, confiscated, to wit, upon the charge aforesaid. And by reason of the premises the residue of the goods, and every part thereof, were and was, and then and thence hitherto hath and have been, wholly taken, kept and detained from and out of the care, custody, possession and control of defendant, to wit, by the said officers of the customs, and according to the law of Cadiz and the kingdom of Spain, and against the will and without the consent, neglect or default of defendant, his agents or servants in that behalf; and, by means of the premises and not otherwise, defendant was then and thenceforth hitherto wholly and absolutely hindered and prevented from further performing his promise as to the residue of the goods. That always, up to, and until, and at, the time of the defendant being so hindered and prevented, &c., as last aforesaid, defendant did take care of and safely carry the same residue of the goods, and otherwise observe and perform his promise in respect thereof, in all things, and was then, and thenceforth, but for the premises aforesaid, ready and willing to and would have fully performed his said promise. Verification.

Demurrer on the following grounds: That it was not averred in the plea with sufficient particularity that the goods were confiscated through any act, default or neglect of plaintiffs: and that it was consistent with the *plea that the goods were adjudged to be contraband, and were confiscated, by the act or neglect of the defendant or some [*521 third person. That it was not averred with sufficient particularity how, or wherefore, or on what account, or by what act, neglect or default, the goods became confiscated. That it was not shown by what law or custom of Cadiz, or of the kingdom of Spain, the goods became confiscated. That it was not averred with sufficient particularity that it was necessary for the purpose of the voyage for the ship to go within the jurisdiction of the said Court. That it was not averred that the goods were contraband, but only that the said Court found them to be so. That the plea

amounted to an argumentative traverse of the negligence alleged in the declaration. Joinder in demurrer.

Crompton, for the plaintiffs. The plea is bad. The defendant's contract to convey the cargo is an absolute contract, subject to certain express exceptions; and no excuse is sufficient, unless it show that performance was prevented within one of the exceptions specified, or by the act of the plaintiffs themselves, or by the law of this country. Even the act of God, if not expressly excepted, would be no excuse: Com. Dig. *Condition* (D 1). The danger contemplated by touching at Cadiz may have been the very reason why the plaintiffs contracted in these terms. It has been held no excuse for the shipper that the loading of a cargo was rendered impossible by pestilence; *Barker* v. *Hodgson*, 3 M. & S. 267: or by foreign embargo or prohibition; *Sjoerds* v. *Luscombe*, 16 East, 201, *Blight* v. *Page*.(a) In like manner it has been held that the shipowner
*522] is not excused, even where government officers of this *country have prevented the performance of his contract to carry goods; *Evans* v. *Hutton*, 4 M. & G. 954; *Gosling* v. *Higgins*, 1 Campb. 451. The excuse here alleged is, that performance was prevented by the revenue laws of Spain. But our Courts do not notice the revenue laws of foreign countries: "no country ever takes notice of the revenue laws of another:" per Lord MANSFIELD in *Holman* v. *Johnson*, 1 Cowp. 341, 343; and the observations of Lord HARDWICKE in *Boucher* v. *Lawson*, Cases K. B. temp. Hardw. 85, 89, 194, 198, are to a like effect. Even if the plea had alleged an intention to violate the revenue laws of Spain, it would be insufficient. A foreigner selling and delivering goods abroad to a British subject may recover the price here, although he knows that the vendee purchased with the intention of smuggling them into England; *Pellecatt* v. *Angell*, 2 C. M. & R. 311; S. C. 5 Tyr. 945; *Holman* v. *Johnson*.

In point of form also the plea is bad; for it does not allege that the goods were, in fact, contraband by the law of Spain, or that they were found to be so, but merely that they were seized on a "charge of suspicion" of being contraband, and were confiscated "upon the charge aforesaid," that is, by reference, a "charge of suspicion," and nothing more.

Bovill, contrà. The plea raises a question which is of great importance, and not governed by any decided case. By agreement of both parties, their property is brought within the jurisdiction of a Court of Justice at Cadiz, and so made amenable to that jurisdiction. Proceedings take place in that Court, in consequence of which the loss of his
*523] property ensues to the freighter. *Those proceedings were in rem and bound the property. The shipowner contends that the freighter must bear the loss which has befallen him in the due course of performance of that contract which he has chosen to enter into.

It is said that the defendant has contracted absolutely, subject to

(a) 3 B. & P. 295, note (a) to *Touteng* v. *Hubbard*.

certain declared exceptions, and that he has not brought his case within them. But the act of God, which is one of the exceptions, extends to other than natural causes, and means no more than inevitable accident; Story on Bailments, 318, s. 489, following Jones on Bailments, 104: and inevitable accident must mean something which has occurred without the defendant's default. [Lord DENMAN, C. J. You would let in the violence of the Queen's friends as an exception; that might be inevitable in the same sense.] It must be conceded that vis major is not always an excuse; but the exceptions of "act of God" and "perils of seas" have been liberally interpreted: Abbott on Shipping, 382, 8th ed., part iv. chap. vi. Thus, capture by pirates, accidental collision, the taking ground in a dock, have been considered perils of the seas: *Pickering* v. *Barkley*, Style, 132; *Buller* v. *Fisher*, 3 Esp. N. P. C. 67; *Fletcher* v. *Inglis*, 2 B. & Ald. 315: so, where in a storm horses broke down the partitions which separated them, and by their kicking wounded each other so that they all died; *Gabay* v. *Lloyd*, 3 B. & C. 793.

Secondly. The plea shows that the loss was occasioned by the default of the plaintiffs themselves in putting contraband goods on board. "The merchant must lade no prohibited or uncustomed goods, by which the ship may be subjected to a detention or forfeiture:" Abbott on Shipping, 402. Here the merchant seeks to *found an action on his own breach of duty towards the shipowner. If the merchant ship goods which require a government order for their landing, he must procure such an order, and so relieve the shipowner from delay; *Hill* v. *Idle*, 4 Campb. 327. The merchant's delay in loading is an answer to an action against the shipowner for not sailing with convoy; *Magalhaens* v. *Busher*, 4 Campb. 54. It seems clear, therefore, that the merchant undertakes to put on board a lawful cargo, and by procuring all necessary documents, and otherwise, to do everything which may assist the conveyance and delivery of his cargo: here he seeks to take advantage of his own wrong. [*524

Thirdly. The plaintiffs are bound by the judgment of the Court of Cadiz. Both parties placed the property within the jurisdiction of that Court. The judgment was in rem and has avoided the contract. A contract is to be governed by the law of the place of performance: Story's Conflict of Laws, 375, 2d ed. s. 280. This contract was to be performed in part at Cadiz. It is true that one country will, in general, not notice the revenue laws of another country for the purpose of invalidating contracts; although eminent text writers reprobate the principle; Story's Conflict of Laws, 332, s. 257. But the practice is subject to this qualification: that every country does notice the judgment of a foreign Court on any case within its jurisdiction, and respects it, not, perhaps, as conclusive, though it is so put by Lord HARDWICKE in *Boucher* v. *Lawson*, Ca. K. B. temp. Hardw. 85, 89, but at all events,

B. & Ald. 315,) has been relied upon in which the straining of a vessel in a dry harbour was held to be within this exception. But there the damage occurred in the regular course of navigation. The loss in this case had nothing to do with the navigation of the vessel; it was caused by the execution of the law of Spain of which both plaintiffs and defendant might be equally ignorant. We must not assume that the plaintiffs knew this law and the defendant did not know it. If the plaintiffs did not know it, the loss was not occasioned by their act. If the plea had stated that the plaintiffs knew their goods would be liable to confiscation under the law of Spain, and that the defendant did not know it, there might be a question as to his liability; I do not say how that might be. *Gosling* v. *Higgins*, 1 Campb. 451, which was the only case cited in *point, has been distinguished on the ground that there the shipowner had a remedy over. I doubt whether that was the ground of the decision. The reference to foreign attachment is inapplicable; for such attachment is, in some sense, the act of the principal debtor, who, therefore, cannot complain of the garnishee's non-payment to him. In this case both parties, perhaps, were ignorant of the law by the operation of which the loss was occasioned. At what time the law was made, and whether the goods were contraband per se, or became so by something done or omitted in respect of them, we do not know. But I disclaim minute considerations of this sort: it was for the defendant to bring himself within the exceptions in his contract; and he has not done so.

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WIGHTMAN, J. I am of the same opinion. The defendant has entered into an absolute contract, subject only to certain specified exceptions, to convey goods to the port of London; and it has been contended with much ingenuity that his excuse for non-performance of his contract falls within one of these exceptions. We have already expressed an opinion against so much of the plea. But the defendant takes higher ground also, and contends that this plea shows that he was prevented from performing his contract by the decree of a competent court, and that this is a valid excuse. But it is not averred that the plaintiffs did any wrongful act in respect of the cargo, or that they knew it to be contraband by the law of Spain, or that it was taken to Cadiz by their desire. The object was to convey the goods to London; and Cadiz is mentioned merely in describing the route of the ship. On the pleadings it does not appear that either party knew that the goods would *be liable to seizure there, or that the voyage was likely to be frustrated by taking that route. There was no illegality in the contract itself; and the case comes within the principle recognised by Lord ELLENBOROUGH in *Atkinson* v. *Ritchie*, 10 East, 530: "The rule laid down in the case of *Paradine* v. *Jane*, Aleyn, 26, has often been recognised in courts of law as a sound one; *i. e.* that when the party by his own contract creates a duty or charge upon himself, he is bound to make it

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good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract:" and he refers to several other cases where the same principle has been recognised. The defendant here was prevented by inevitable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so, and is without excuse. The case of foreign attachment furnishes no analogy. There the law enables a third person to step in and take advantage of a contract between others; the payment by the garnishee to him, is, by law, also a payment by the garnishee to his own creditor.

ERLE, J. The defendant's contract was, in effect, a contract of insurance against all but certain specified risks; and the seizure in question was not one of them. The only remaining defences which would be open to the defendant are that the contract was illegal by the law of this country, or that the plaintiffs themselves prevented him from performing his contract. Neither of these cases is set up by the plea.

Judgment for plaintiffs.(*a*)

(*a*) Reported by H. Davison, Esq.

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*DOE on the demise of PENNINGTON and Others *v.* BARRELL and Another. *May* 6. [*531

After verdict in ejectment the successful party may sue out execution on the consent rule for the amount of his taxed costs, under stat. 1 & 2 Vict. c. 110, s. 18, without any previous rule calling upon the opposite party to pay such amount.

HURLSTONE, on a former day in this term, obtained a rule to show cause why a writ fi. fa., which had issued in this case, should not be set aside for irregularity.

The defendants having obtained a verdict, had their costs taxed, and issued the fi. fa. for the amount, by way of execution on the consent rule, under stat. 1 & 2 Vict. c. 110, s. 18. The consent rule was in the common form: and the objection to the writ was that, according to *Jones* v. *Williams*, 11 A. & E. 175, 178, "the power of issuing execution on a rule must be confined to cases where the money payable by the rule is expressed in the rule itself;" whereas this rule was quite general, viz. that, in case the defendants should succeed at the trial, "then the lessors of the plaintiff shall pay to the defendants costs in that case *to be adjudged.*" *Hurlstone* also cited *Hawkins* v. *Benton*, 2 D. & L. 465, and *Doe dem. Steer* v. *Bradley*, 1 Dowl. P. C. (N. S.) 259, in which last case it had been suggested by PATTESON, J., that a rule should be taken to show cause why the lessor of the plaintiff should not pay the costs mentioned in the allocatur, with a view to issuing execution subsequently on such rule.

Wallinger now showed cause. The application in *Doe dem. Steer* v. *Bradley* was for an attachment; and *the suggestion of PATTESON, J., was accepted at once on the failure of that application, [*532

so that the question whether the rule suggested was necessary or not received no consideration. Costs stand upon a different footing from money ordered to be paid by an arbitrator, which is payable under the award, and not under any rule of Court. In *Jones* v. *Williams*, 8 M. & W. 349, 358, PARKE, B., observes, upon the eighteenth section of 1 & 2 Vict. c. 110, "It is argued, that where the Court orders the payment of costs, something must be done in order to ascertain their amount before execution can issue. No doubt that is so; but then costs are not liable to the same observation as money, as they stand upon a peculiar footing. When the legislature mentions 'money, costs, charges, and expenses,' it means money decreed or ordered to be paid, together with the costs, charges, and expenses, to be ascertained in the usual way by the officer of the Court. That point, indeed, it is unnecessary to decide; but I am of opinion, that with respect to costs, it is enough if they are ascertained by the officer of the Court, and that it is not necessary that there should be any order to pay after they are taxed by the officer." The observations of TINDAL, C. J., are very similar, in *Hodson* v. *Patterson*, 4 M. & Gr. 333. There the defendant had obtained a rule for the costs of the day, and the Court, after such costs had been ascertained by the Master, thought it unnecessary to issue another rule for payment of the amount, in order to warrant execution for them under the statute. (He was then stopped by the Court.)

Hurlstone, contrà. The consent rule, on the face of it, is not an order for payment of costs absolutely, but on *a contingency. [WIGHTMAN, J. It is absolute as soon as the contingency happens: the contingency has happened: the defendant has the verdict, and the costs are payable.] The rule speaks of costs "*to be* adjudged." [WIGHTMAN, J. That refers merely to the Master's allocatur.] The reasoning in the judgment of this Court in *Jones* v. *Williams*, 11 A. & E. 175, 177, applies exactly to the present case. "These rules are to have the effect of judgments, which are to charge the land; and therefore the sum to be so charged ought to be distinctly stated in the document which thus charges the land, so that purchasers or creditors may know what it is. Judgments are to bind the land from the time directed by law. But, when rules like this are made, they also ought to bind the land at the time they are entered; but, at that time, there is nothing to inform anybody of the charge: the amount may not be ascertained for a year afterwards." The consent rule is no part of the record; it is the mere agreement of the parties entered into under the sanction of the Court; and, after verdict given, it is not certain that any costs will be payable to the defendant, for he may have refused to admit documents, and so have fixed himself with the payment of a greater amount of costs than the verdict can give him. In *Hodson* v. *Patterson*, 4 M. & Gr. 333, there was no decision. In *Doe d. Whatley* v. *Knight*,(a) where the lessor of

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(a) 7 Jurist, 815, May, 3, 1843.

the plaintiff was nonsuited through default made by the defendant, WIGHTMAN, J., granted a rule to show cause why the defendant should not pay the costs which had been taxed by the Master.

*Lord DENMAN, C. J. I think what has been done is quite right. The consent rule gives the costs "to be adjudged," that is, settled by the Master; and, when they have been so settled, the same rule is an absolute order for payment of them. [*534

PATTESON, J. In the case of an award the rule of Court is merely that the parties to the reference abide by the award; no costs are payable under such a rule.

WIGHTMAN, J. I think the case is within the very terms of the statute.

ERLE, J. The only contingency in the case is within the judicial notice of the Court; the Court knows that the verdict has been given for the defendants, and the rule for payment of costs has become absolute.

Rule discharged.(a)

(a) Reported by H. Davison, Esq.

The QUEEN *v.* The Town Council of LICHFIELD. *May* 6.

Where a town council had removed a town clerk from his office, by resolution, for misconduct, and refused his claim of compensation: *Held*, that the costs of an attorney employed in opposing a mandamus to assess compensation were properly chargeable to the borough fund, under stat. 5 & 6 W. 4, c. 76, s. 92, although the jury found the issues ultimately raised on the mandamus for the late town-clerk: it not being shown that the town council acted otherwise than bonâ fide in the removal.

The attorney having been retained generally by a resolution of the town council, and having also been authorised and retained by resolution of the town council to take proceedings in opposition to the rule nisi for the mandamus: *Held*, that this was a sufficient retainer to warrant the payment to him of the costs of defending the issues.

And that it was no objection to the order for payment made in consequence, that it was an order for payment on account, the attorney not having delivered a bill, and it not appearing that the sum ordered to be paid exceeded the sum due to the attorney.

A RULE had been obtained calling upon the council of the city and borough of Lichfield to show cause why a certiorari should not issue, directed to them, to *remove into this Court two orders made by the council of the said city and borough. The first was an order or resolution made at a meeting of the said council held on 16th December, 1846; by which it was resolved and ordered that 300*l.* should be paid to "Mr. Alfred Eggington, our attorney, on account of law expenses:" the second was an order or resolution made by the said council on the same day, signed by three members of the council, and countersigned by the town clerk, directed to the treasurer of the borough, ordering the said treasurer to pay the said A. Eggington "300*l.* on account of law expenses." [*535

It appeared, on affidavit in support of the rule, that the costs were incurred in respect of legal proceedings instituted by Charles Simpson,

the late town clerk, for the purpose of compelling the council to assess a compensation for his office, from which he had been removed by the town council. These proceedings commenced by a rule nisi for a mandamus, obtained in Michaelmas term, 1845, and subsequently made absolute. A return was made, which Mr. Simpson traversed, raising several issues of fact which were tried at the Staffordshire Summer assizes, 1846. A verdict was given for the Crown on all the issues; judgment was entered, and a peremptory mandamus issued; and thereupon the council assessed compensation to Simpson, and his costs were paid; but (as was stated) not out of the borough fund. The orders for payment of the costs now in question were made in general terms, as above mentioned; and no bill of costs was produced before the council on the occasion of their being made. It appeared also by the affidavits in support of the rule, that, before the making of the orders, Eggington

*536] *had received 50*l.* out of the borough fund on account of law expenses, whereof no bill was produced to the council. And it was sworn "that the said council did not at any meeting of the said council retain or employ the said A. Eggington as the attorney of the said council, to defend the said return to the said mandamus, or to defend the said council or any member thereof for the making of such return, or to act as their attorney to defend them in any prosecution of the said council by the said C. Simpson in respect thereof; but, on the contrary, the said A. E., subsequently to the filing of the said return, acted without any authority whatever from the said council in all proceedings connected with the same."

By the affidavits in answer to the rule it appeared that, on 20th January, 1844, a meeting of the town council was held (amongst other things) to consider the report of a committee previously appointed as to the duties, salaries, emoluments and perquisites of the present corporate officers, and the manner in which they had discharged their duties, and to make such orders thereon as the council might think fit, either as to the removal, resignation, or continuance in office of any of the then officers; and, in case of removal or resignation, for the appointment of others in their place. That at this meeting a report was read, which was set out in the affidavits, and which imputed misconduct to the town clerk, Mr. Simpson. That at such meeting Mr. Simpson was heard before the council in opposition to the report. That upon such hearing a resolution and order of the council was proposed and agreed to, removing Simpson from his said office of town clerk. As to the retainer of Mr. Eggington, it appeared by

*537] the *same affidavits that at a meeting of the town council, of the 12th February, 1844, a resolution was entered in the minute book, for retaining and appointing A. Eggington (the town clerk) as solicitor of the council, and of the mayor, &c., in all matters, suits, &c., touching or concerning them; and the common seal of the borough was affixed to a retainer of A. Eggington to that effect. That, in July,

1844, C. Simpson served the said A. Eggington, as town clerk, with his claim for compensation, amounting to 3520*l.*; and, on such claim being laid before the council, it was resolved that the same should be wholly disallowed, the council being of opinion "that the said C. Simpson was properly removed from the said office of town clerk for such misconduct as would warrant removal from any office held during good behaviour; and this council being also of opinion that the illegal detention by the said C. Simpson of the deeds, papers, property and documents of the said council, after his dismissal from the office of town clerk, and after a lawful demand of the same, is a further reason for the disallowance of his claim." That, on the rule nisi for a mandamus to assess compensation having been obtained, it was resolved at a meeting of the town council "that A. Eggington should be authorised and retained to take proceedings in opposition to the rule nisi;" and, on the rule being made absolute, the return to the writ was read by the said A. Eggington at another meeting of the town council, and ordered to be filed. That the issues were tried by a special jury; and, though a verdict was found for the Crown on all of them, yet the jury made an observation censuring the conduct of Mr. Simpson: And that the costs out of pocket, in showing cause against the rule nisi for the *mandamus, in preparing the return, and in attending the trial of the mandamus, and incident thereto, amounted to much more than the 300*l.*, which sum was paid on account before the bill was made out or the whole proceedings had terminated. And that, in the judgment of the town council, the above expenses were necessarily incurred in the performance of the duties cast upon them. [*538

The rule was obtained on these grounds: 1. That the payment of these expenses out of the borough fund was not authorised by stat. 5 & 6 W. 4, c. 76, s. 92. 2. That the affidavits showed no distinct retainer of Mr. Eggington for the trial of the traverses, being the business in respect of which these particular costs were incurred. 3. That the sum was paid before the bill was delivered, or it could be known that costs to that amount had been incurred in respect of this business.

Talfourd, Serjt., and *Cowling* now showed cause; and *Whately* and *Cole* supported the rule. As to the first point, *Regina* v. *The Town Council of Lichfield*, 4 Q. B. 893; *The Attorney General* v. *Corporation of Norwich*, 1 Keen, 700; *The Attorney General* v. *The Mayor of Norwich*, 2 Myl. & C. 406; *Regina* v. *The Mayor, &c., of Bridgewater*, 10 A. & E. 281; *Regina* v. *Paramore*, 10 A. & E. 286; *Regina* v. *The Town Council of Stamford*, 4 Q. B. 900, note (*a*); *Regina* v. *Thompson*, 5 Q. B. 477; *Regina* v. *The Mayor, &c., of Leeds*, 4 Q. B. 796, and *Regina* v. *Mayor of Gloucester*, 5 Q. B. 862, were cited. It was contended, in opposition to the rule, that, if an order of this description were brought up by *certiorari, it could not be disallowed [*539

under stat 7 W. 4 & 1 Vict. c. 78, s. 44, unless for objections appearing on the face.

Lord DENMAN, C. J. This is an application having for its object to annul the payment out of the borough fund of certain law expenses. The defence on the part of the town council is, that these expenses were incurred in sustaining the act of the town council in dismissing an officer for misconduct. It is true that the jury found, on an issue submitted to them, that the officer had not been guilty of such misconduct as would warrant his dismissal. But it does not follow that the town council may not have been bonâ fide persuaded of such misconduct: nor is it sworn that they were not. We cannot, therefore, say they have done wrong in incurring legal expenses to support their own determination. Secondly, I think these affidavits make out a sufficient retainer. There was a resolution authorising proceedings in opposition to the rule nisi. Thus far there was a clear retainer: and it cannot be contended that an express resolution was afterwards necessary to justify the attorney in taking each particular step in the case. Lastly, I think the non-delivery of the bill no objection, unless it were clearly made out that the sum paid exceeds the claim, which is not the case.

PATTESON, J. I do not agree in the construction which it is sought to put on stat. 7 W. 4 & 1 Vict. c. 78, s. 44: were that correct, orders of a town council in this general form could never be inquired into at all, inasmuch as the objections to them cannot appear *unless raised by affidavit. But I think this order good for the reasons already given.

*540]

WIGHTMAN and ERLE, Js., concurred. Rule discharged.(a)

(a) Reported by H. Merivale, Esq.

The QUEEN v. TURK. *May* 7.

A conviction under the Merchant Seaman's Act having taken place in September, and having been returned to the following sessions, a certiorari was obtained to remove it; a rule for a concilium granted in November; and the points delivered in January, disclosing an objection, that the evidence was not set out. The Court, in its discretion, refused to allow the conviction to be taken off the file and returned to the justices that they might amend it by inserting the evidence.

Semble, that a certiorari to remove a conviction "for certain trespasses and contempts against the form of the statute," &c., is sufficient to bring up a conviction for harbouring seamen, being a single offence under the statute:

But, the justices having returned the conviction to the quarter sessions, and the sessions to this Court, held that, at all events, the certiorari could not then be quashed on the ground of this variance; or, because it improperly described the justices as "assigned to hear and determine divers felonies," they being borough justices only.

IN this case a rule nisi had been obtained to quash two writs of certiorari bringing up a conviction, and to take the conviction off the file and return it to the justices who made it: or, to take the conviction off the

file and return it to the justices in order that they might amend the same.

The following facts appeared on affidavit. The defendant, on 22d September, 1846, was convicted by J. Hatch and T. Hawkins, Esquires, justices of the peace in and for the borough of Newport, in the county of Monmouth, under the Merchant Seamen's Act, 7 & 8 Vict. c. 112, s. 10, of harbouring seamen who had deserted from a merchant ship called the Hibernia. On 17th November a certiorari issued on the application of Sir *J. Jervis*, Attorney General, to remove this conviction, and was served on one of the justices. On 21st November the justices certified that they had returned *the conviction to the Michaelmas quarter sessions for the county of Monmouth: and they returned a copy. [*541
On 3d December another certiorari issued at the instance of the Attorney General, to the quarter sessions, to remove the conviction itself. No rule to show cause had been obtained before issuing either certiorari. The form of the second was, to return the record of a conviction "by J. Hatch and T. Hawkins, Esquires, two of the keepers of our peace, and our justices assigned to hear and determine divers felonies, trespasses and other misdemeanours committed within the said borough of Newport, in our county of Monmouth, of T. Turk, for certain trespasses and contempts against the form of the statute entitled 'An act to amend and consolidate the laws relating to merchant seamen; and for keeping a register of seamen.'" The justices returned the conviction; which appeared to be made on 22d September, 1846, by J. H. and T. H., "two justices of the peace in and for the borough of Newport." The conviction did not set out the evidence on which it proceeded. On November 25th, Sir *J. Jervis*, Attorney General, on behalf of the defendant, obtained a rule for a concilium. The ground of objection to the conviction, disclosed in the defendant's points for argument, delivered in January, was that it was bad for not setting out the evidence.

The affidavit on which the present rule was obtained set out the minutes of the evidence taken before the justices at the hearing, which had not been inserted in the conviction.

Sir *J. Jervis*, Attorney General, and *Godson* appeared in opposition to the rule. But

*The Court called on [*542
Greaves in support of the rule. This application is undoubtedly new in the present form: but it is to the discretion of the Court, and is important for the ends of justice, in order that the validity of a conviction under the recent Merchant Seamen's Act may be fairly tested. And, in substance, it is warranted by *Rex* v. *Jukes*, 8 T. R. 625. In that case a conviction, affirmed by the sessions on appeal, had been removed into this Court by certiorari, and quashed for a defect in the information, which omitted an essential negative. After the conviction had been quashed, the prosecutor moved to have the original information

returned: which the Court, it is true, refused to grant, on the ground of injustice in that particalar case, but without any doubt as to its power; and they put the defendants under terms not to bring actions against the convicting justices. In *Rex* v. *Barker*, 1 East, 186, Lord KENYON expressed his approval of the practice of amending convictions in point of form after they have been made. Applications have in several cases been granted for writs of mandamus to amend records of convictions by setting out the evidence; *In re Rix*, 4 Dow. & R. 352;(*a*) *Rex* v. *Warnford*, 5 Dow. & R. 489. There can be no doubt now that the power to amend a conviction exists until a court of competent jurisdiction has pronounced it invalid; *Chaney* v. *Payne*, 1 Q. B. 712; *Sellwood* v. *Mount*, 2 Q. B. 726, 734. That the return to a certiorari may be taken

*543] off the file for the purpose of *sending back the proceedings appears from *Rex* v. *Wakefield*, 1 Burr. 485, 488, 9, and *Rex* v. *Neville*, 2 B. & Ad. 299; the return was amended in *Rex* v. *Hill Darley*, 4 East, 174; and Lord KENYON says in *Rex* v. *Mayor of Grampound*, 7 T. R. 699, that similar amendments are wholly in the discretion of the Court, and to be made for the furtherance of justice. *Richardson* v. *Mellish*, 3 Bing. 334, is a strong instance.

2. The writ of certiorari does not follow the conviction, which is described as being "of certain trespasses and contempts:" whereas it appears to be only of one particular offence under the act, namely, the harbouring deserters from a merchant vessel. The justices are also improperly described as "assigned to hear and determine divers felonies," &c., which, as borough magistrates, they cannot do. Such a variance renders the certiorari defective, and the magistrates are not bound to make any return to it; Dalton's Justice, 412; *Rex* v. *Hedingham Sible*, Burr. S. C. 112; *Regina* v. *Plint*, 2 Ld. Ray. 820; 4 Vin. Ab. *Certiorari*, 556 (L) pl. 1, &c. [Lord DENMAN, C. J., asked the Attorney General whether he would consent to the terms imposed in *Rex* v. *Jukes*, 8 T. R. 625, namely, that the defendant should bring no action against the magistrates. The Attorney General declined this, and was proceeding to show cause against the rule on the first point, when he was stopped by the Court.]

Lord DENMAN, C. J. As to this point, it appears to us too much for the magistrates to ask for the indulgence. We lay down no general rule

*544] to bind the Court. Its *discretion must be guided by the justice of the case, and also by the expediency of having the substantial question discussed. But in the present instance we perceive no sufficient inconvenience from leaving that question undecided. It will probably occur again, and may then be regularly raised. It is to our mind a far less mischief to leave a point undecided and an alleged offender unconvicted, than to break in upon the established course of practice without strong reason. The time which has elapsed in this instance, from September

(*a*) See *Rex* v. *Marsh*, 4 Dow. & R. 260, 264, note (*a*).

to May, seems alone to furnish a sufficient answer to this application. The magistrates had abundant opportunity to set the error right, and might have done so even after the certiorari was obtained.

Sir *J. Jervis*, Attorney General, and *Godson* then showed cause on the second point. The certiorari follows the ordinary form; and the general word "trespasses" must include the single offence. As to the other point, namely, the misdescription of the justices, it is sufficient to say, that the writ has done its office. Whether they were bound to make the return is another matter. Perhaps, if they had declined to do so, they would not have been in contempt. But the return is now before the Court. In *Regina* v. *Plint* the misdescription was material: the certiorari recited a conviction "for removing foreign salt:" the real conviction appeared to be for removing salt generally: the duties on these articles were different. Besides, the judgment in that case was, that "this order was not removed" by the certiorari.

*Lord DENMAN, C. J. The form, as to the description of the offence, appears to be right: it is the usual one, given in Corner's Crown Practice,(*a*) and adopted generally. Besides, the certiorari has done its office. The justices might have returned that there was no such conviction, and that they could not obey the writ: but, as they have obeyed it, the conviction is before us, and the objection cannot now be taken. [*545

PATTESON, J. The two writs have brought up a copy of the conviction from the justices, and the original from the sessions. The magistrates now say that the conviction they have returned to the sessions is not that which the certiorari required. It is too late for them to make such an objection.

WIGHTMAN, J. Some difficulty might have arisen, if the justices had not obeyed the writ: but, as they have done so, they cannot object to the variance.

ERLE, J., concurred. Rule discharged, without costs.

Afterwards (in Trinity term, 1847), the conviction was quashed.(*b*)

(*a*) See Corner's Forms, &c., p. 48.

(*b*) Reported by H. Merivale, Esq.

END OF EASTER TERM.

*546]

*Easter Vacation.

In the Exchequer Chamber.

(Error from the Queen's Bench.)

HOOPER, Esquire, and Another, v. LANE and Another. *May* 13.

Case against the sheriff for negligence in not arresting B., on a ca. sa. issued by plaintiff: alleging further, as a breach, that defendant wrongfully arrested B. under the illegal pretence of another writ, whereas there was no such writ, and falsely imprisoned B., by reason of which B. was ordered by a Judge to be discharged, and was so discharged, and immediately departed out of defendant's bailiwick; whereby defendant deprived himself of the means of lawfully taking or detaining B. under plaintiff's writ, and could not take him under plaintiff's writ after his departure. Defendant pleaded Not guilty, and traversed that he could have arrested B., modo et formâ. It appeared that, after the delivery of plaintiff's writ to defendant, another writ (which was void for defects apparent on the face of it) was delivered to defendant at the suit of A.; that defendant granted a warrant under the last writ; that defendant's officer arrested B. under this warrant, having no other in his possession; and that B. was detained under it, till he was discharged from custody under A.'s void writ by a Judge's order, and afterwards, by another order, from custody under plaintiff's writ; after which B. left the bailiwick.

The Judge directed the jury that there had been no arrest at plaintiff's suit: and that the Judge's order discharging B. from custody at plaintiff's suit, was no justification to the sheriff: and that he would leave to the jury the question, whether defendant had acted negligently in arresting B. on A.'s void writ, and not arresting him on plaintiff's good one. *Held* that the summing up, so far, was correct.

The Judge then directed the jury that if they believed the evidence, enough appeared to establish such negligence as would make defendant guilty in point of law. *Held* an incorrect ruling. For, that, on the issue joined on the second breach in the declaration (assuming that breach to be well assigned), the Judge ought to have left to the jury the question, whether the defendant knew or ought to have known that A.'s writ was a void one.

THIS was an action on the case against the plaintiffs in error (defendants below), sheriff of Middlesex, for negligence. The declaration stated that the plaintiffs below had, on 3d May, 1842, recovered judgment against Anthony Bacon for a debt of 551*l.* 4*s.* and costs. That (part of the debt being paid) plaintiffs below, to wit, on, &c., obtained a ca. sa. against Bacon for 323*l.* 3*s.* 4*d.*, to satisfy the residue of the debt. That Bacon, at the time of the delivery of the writ to

*547] *the defendants below, and from thence for a long space of time, to wit, three weeks, was within the said sheriff's bailiwick; and defendants below, who during all that time continued sheriff, &c., at any time during that period (the same being more than a reasonable and necessary time in that behalf), might have taken and arrested him by virtue of the writ, if they would so have done, whereof, &c., (notice to defendants, so being sheriff, &c.); yet defendants, so being sheriff, &c., not regarding the duty of their said office, but contriving, &c., to injure plaintiff, &c., did not nor would, at any time after the said writ was so delivered to them as aforesaid, during the said space of time aforesaid, although often requested so to do, and although a reasonable time had

elapsed for them so to do, take or cause to be taken the said Anthony Bacon under and by virtue of the said last mentioned writ as thereby they were commanded, but therein failed, &c.: And afterwards, and at the end of the said space of time, defendants, further contriving, &c., did not nor would take the said A. B. under the said last mentioned writ, and wrongfully, unjustly and illegally, by themselves, their agents and officers, to wit, on, &c., took and imprisoned the said A. B. under the false and illegal pretence of a certain other writ of our Lady the Queen to them the said sheriff directed; whereas in truth and in fact there never was any such writ; and then wrongly and falsely detained and imprisoned the said A. B. for a long space of time, to wit, one week; by means whereof the said A. B. was afterwards, to wit, on 9th August, 1843, by a certain order of the Hon. Sir THOMAS COLTMAN, Knight, one of Her Majesty's Justices, &c., of the Bench, &c., ordered to be and was *discharged from and out of the custody of the defendants, [*548 (they continuing and being sheriff, &c.); and thereby the defendants, during all that time last aforesaid, while they so wrongfully imprisoned the said A. B. as aforesaid, and for a reasonable time after his discharge from his said imprisonment, were unable to, and could not and did not, take, arrest or detain the said A. B. under the said writ of the said plaintiffs, but were obliged to suffer and permit the said A. B. to depart from their said custody: and the said A. B. did then, and immediately after his discharge from his said imprisonment, depart from and out of the custody of defendants, and from and out of the bailiwick of the said sheriff (defendants continuing and being such sheriff, &c.), until a long time thereafter, to wit, until, &c.; whereby defendants continually from the time of the said unlawful arrest of A. B. until the said A. B. so departed from their bailiwick as aforesaid, to wit, for the space, &c., lost and deprived themselves of the means of lawfully taking or detaining the said A. B., and, by reason thereof, and of such departure from and out of the said bailiwick, could not at any time thereafter take the said A. B. under the said writ of the said plaintiffs. Whereby, &c.: stating as damages that plaintiffs' writ became useless, and they lost the opportunity of obtaining satisfaction of their judgment, and are likely to lose the benefit of the same, and have been put to charges, &c., in and about procuring a return by defendants to the said writ.

Pleas, among others: 1. Not guilty; 2. Denying that the defendants below could have arrested modo et formâ. Issues thereon.

It appeared by the error book that the cause was *tried before [*549 Lord DENMAN, C. J., at the sittings at Westminster after Trinity term, 1845, when it was proved that a ca. sa. for 323*l.* 3*s.* 4*d.*, at the suit of the plaintiffs below against Bacon, dated 14th May, 1842, was delivered to the defendants below, then sheriff of Middlesex; to which the defendants below returned that they took Bacon under the writ, and

kept him until the 9th August, 1843, when they discharged him in pursuance of an order of COLTMAN, J.: and, from and after 9th August, non est inventus. That the sheriff's officer had a warrant, in August, 1843, purporting to be granted by the defendants below on a writ of capias ad respondendum against Bacon at the suit of Juan Antonio Aramburn; and that a piece of parchment, purporting to be such writ, indorsed for bail, had been brought to the office of the defendants below: That the attorney's clerk who brought this writ informed the sheriff's officer where Bacon was to be found, which up to that time the sheriff's officer had not known: That the officer accordingly took Bacon, on the 2d August, 1843, in Gower Place, New Road, and removed him to a lock-up house, where he remained some days; and that, at the time of such arrest, the sheriff's officer had no other warrant against Bacon in his possession. The piece of parchment in question was produced, purporting to be a writ of capias as aforesaid, issued out of the Court of Exchequer at the suit of Juan Antonio Aramburn; but it was not duly signed or marked by the signer of the writs, nor had a præcipe thereof been taken to the office of the Court, according to the practice of the Exchequer. It was further shown that a summons had been taken out for the discharge of Bacon in Aramburn's suit, on the ground *of these irregularities, and an order made by COLTMAN, J., accordingly: and that a summons was afterwards obtained and an order made thereon by COLTMAN, J., for the discharge of Bacon from custody on the writ of the plaintiffs below; and Bacon was accordingly discharged: after which he went out of the bailiwick.

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The Lord Chief Justice "directed the jury, and ruled, that there had been, as stated in the declaration, no arrest at the suit of the said plaintiffs: that the order of Mr. Justice COLTMAN was no justification to the sheriff: and that, if they believed the above statement, the defendants were liable for negligence:" and he added "that he would leave to them to say whether or not in point of fact the defendants had been negligent in arresting the said A. Bacon under the said bad writ and not under the writ of the plaintiffs; and that, if they thought there had been no such negligence, they should find their verdict for the defendants;" and further, "that, if they believed the evidence so given, then he ruled that the said defendants had been guilty of negligence in point of law, and they the said jury ought to find a verdict for the plaintiffs, and that the only question for them was the amount of damages, if they believed that in point of fact the said defendants had been guilty of negligence as aforesaid."

On this direction the counsel for the defendants below tendered a bill of exceptions, on the ground that the Lord Chief Justice ought not to have directed the jury that there had been no arrest at the suit of the plaintiffs below; or that the order of COLTMAN, J., was no justification to the sheriff; but should have given the contrary directions: and that

he ought not to have left it as a question to the jury whether there was *negligence, &c. (as above), or directed them that, if they believed the facts, they ought to find for the plaintiffs, but should have directed them that it was not negligence to proceed on the bad writ, and that, if they believed the evidence, they should find for the defendants. [*551

A verdict having been given for the plaintiffs below under the above direction, and judgment signed accordingly, the defendants below brought error in the Exchequer Chamber. The case was argued on the writ of error in Michaelmas vacation, 1846.(a)

Kennedy, for the plaintiffs in error. In the first place, there was an arrest under the plaintiffs' writ, inasmuch as that writ was in the sheriff's office when the arrest under Aramburn's illegal writ took place. Therefore, if any action lay, it was for an escape, or else a special action on the case. The subject may be looked at as if the arrest had been made by the sheriff in person. Although, at the time, he might intend to arrest, and suppose himself to be arresting, under Aramburn's writ, he would be in fact arresting under any legal writ which happened to be in his office. This would certainly be the case if the arrest were by the sheriff in person; *Dr. Grenville* v. *College of Physicians*, 12 Mod. 386; *Crowther* v. *Ramsbottom*, 7 T. R. 654; *Lucas* v. *Nockells*, 10 Bing. 157, 162, 186, 188, 197; S. C. in Exch. Ch. 4 Bing. 729. [PARKE, B., cited *Oakes* v. *Wood*, 2 M. & W. 791.]

But the arrest being by the officer makes no difference. The warrant identifies the sheriff with the officer. The bound bailiff is a known officer of the law, and *need not show his warrant when he arrests; Dalton's Sheriff, 110, c. 22. It might be otherwise in the case of a special bailiff. [MAULE, J. A bailiff is a known officer of the law for certain purposes: but, where a sheriff acts by a bailiff, is not he to be regarded as a special bailiff, and not as a known officer? Although in fact the sheriff usually appoints the same person, yet each appointment is only *pro hac vice*.] At all events there is no evidence to show that Bacon objected, or required production of the warrant; and therefore the objection is not open to the plaintiff below. The warrant need not be shown until demanded; *Hodges* v. *Marks*, Cro. Jac. 485; *Mackalley's Case*, 9 Rep. 65 *b*, 69 *a*; *Countess of Rutland's Case*, 6 Rep. 52 *b*, explaining *Hall* v. *Roche*, 8 T. R. 187. [*552

A party illegally arrested by an officer without warrant may nevertheless be detained, while in custody, by a legal warrant from the sheriff, unless the sheriff was guilty of collusion, or adopted the illegal act of the officer; *Robinson* v. *Yewens*, 5 M. & W. 149;(b) *Ex parte Cogg*, 6 Dowl. 461; Com. Dig. *Execution* (C) 10; *Reynolds* v. *Newton*, 1 Gale & D. 1, 3:(c) and there is no evidence of collusion, or of such

(a) December 3d. Before WILDE, C. J., COLTMAN, MAULE and WILLIAMS, Js., PARKE. ALDERSON, ROLFE and PLATT, Bs.

(b) See *Collins* v. *Yewens*, 10 A. & E. 570.

(c) S. C., as *Barrack* v. *Newton*, 1 Q. B. 525.

adoption. [MAULE, J. It would follow that a party might be illegally imprisoned in one bailiwick and carried into another, and then legally arrested in the second bailiwick.]

2. Next, the order of COLTMAN, J., was a justification to the sheriff. Either the Judge was wrong, in which case the arrest was good, or he was right, and the *sheriff justified in obeying him; Dalton's *553] Sheriff, 106, c. 21, citing *The Case of the Marshalsea*, 2d point, 10 Rep. 68 *b*, 70 *b*.(*a*)

3. At all events, the fact that Bacon was arrested is a sufficient answer to this action. Bacon might be entitled to be discharged from both writs: still he was in fact arrested, and that at the suits both of Aramburn and of Lane. It is conceded that he was arrested at the suit of the first: that he was so at the suit of the second is proved by the necessity of discharging him. The declaration, therefore, wrongly avers the arrest under Aramburn's writ and denies that under Lane's; *Taylor* v. *Richardson*, 8 T. R. 505.

Lastly, if this be otherwise, negligence on the part of the sheriff cannot be inferred from his not arresting at the suit of Lane. In the ordinary case of such actions, it lies on the plaintiff to prove, not only that the man to be arrested was in the country, but that the sheriff must have had some notice of the fact. [PARKE, B. It has been held that the averment of notice is not traversable. The sheriff would be guilty of negligence, though he had no notice of a fact, if there were evidence that by taking proper pains he might have found it out.] That is so of notice in the technical sense; but the sheriff must be shown to have either knowledge or means of knowledge; *Dean of Hereford* v. *Macknamara*, 5 Dowl. & Ry. 95.(*b*) Here there was no evidence at all of any notice or knowledge before the arrest under Aramburn's writ. There was not time for the sheriff to have notice. [MAULE, J. The fact appears to be that he had information, but that, instead of using it for a legal purpose, *554] he used it for an illegal one.] If the sheriff is to be fixed by *constructive notice, it must be by notice given to him or his officer in the particular case, and not in another: anything that can be viewed as constructive notice will not suffice; *Gibbon* v. *Coggon*, 2 Campb. 188, 189; *Drake* v. *Sykes*, 7 T. R. 113. The jury should have been asked whether there was any evidence that, if Aramburn's writ had been out of the question, the sheriff could have known that Bacon was in his bailiwick.

Watson, contrà. In this case a valid writ was in the sheriff's office. While it lay there, a writ, bad on the face, against the same party, was taken into the office. This was handed, by gross negligence, to the officer. The officer arrested Bacon, and kept him in custody, under this piece of waste paper. The plaintiff in his declaration avers that Bacon was in the bailiwick and might have been arrested by virtue of the legal

(*a*) See 76 *a*, *b*.

(*b*) See judgment of BAYLEY, J.

writ; that the sheriff neglected so to arrest him; and that the sheriff afterwards imprisoned Bacon under the false and illegal pretence of another writ: by means of which Bacon was ordered to be discharged, and consequently the sheriff was unable to take him. To this it is answered, that the only knowledge the sheriff had of Bacon being in his bailiwick was through Aramburn's writ. But the question is, whether in point of fact the sheriff had reasonable means of ascertaining the place where Bacon was. Now, in point of fact, Aramburn's writ specified Bacon's residence, and therefore conveyed to the sheriff the reasonable means of ascertaining. [MAULE, J. But the important question is, whether the arresting under the bad writ was negligence: and this does not appear to have been left to the jury.]

*In the next place, there was no valid arrest under the plaintiff's writ. The arrest under the bad writ was not less illegal because the officer had a good writ in his possession; *Barratt* v. *Price*, 9 Bing. 566. If indeed the officer, at the time when he arrested under the bad writ, had been armed also with a warrant under Lane's writ, the case would have been different; *Robinson* v. *Yewens*, 5 M. & W. 149. But it is impossible to say that the sheriff can by his own act convert an unlawful authority into a lawful: the party was not, in contemplation of law, in custody at all; *Pearson* v. *Yewens*, 5 New Ca. 489; *Reynolds* v. *Newton*, 1 G. & D. 153; (a) *Collins* v. *Yewens*, 10 A. & E. 570. [WILDE, C. J. But the declaration states that the sheriff "took and imprisoned" Bacon under the void writ: the fact of imprisonment stands admitted for all purposes. MAULE, J. Your argument must be that the sheriff "took" Bacon under circumstances which would have justified Bacon in leaving the cstody, and that such a taking does not constitute an arrest.] Even if at first Bacon was arrested in fact, the sheriff so conducted himself as to cause him to be discharged, and privileged from arrest *redeundo*: and this is the point of the charge against him. [*555

Kennedy, in reply. The fact, that Bacon's residence was mentioned in Aramburn's writ, was a circumstance from which negligence might or might not have been inferred, and ought therefore to have been left to the jury. So, the period during which Lane's writ had lain in the office; and similar circumstances. All these made up the question of negligence, which was not, *though so treated by the Judge, a simple question of law. *Cur. adv: vult.* [*556

WILDE, C. J., now delivered the judgment of the Court. After stating the nature of the action, the tender of a bill of exceptions, and the verdict found, his Lordship continued as follows.

Two breaches of alleged duty were assigned in the declaration. The first breach assigned was, that the defendants did not, within a reasonable time while the defendant was in their bailiwick, arrest or cause him to be arrested at the suit of the plaintiffs, upon the said writ of ca. sa.

(a) S. C. as *Barrack* v. *Newton*, 1 Q. B. 525.

The second breach was, that the now defendants wrongfully and illegally arrested and imprisoned Bacon upon false pretence of a certain writ, whereas in fact there never was any such writ, and detained Bacon until discharged by the order of Mr. Justice COLTMAN, and thereby, while they so imprisoned Bacon, and for a reasonable time after his discharge, the defendants were unable to, and could not and did not, arrest or detain Bacon under the plaintiffs' writ, but were obliged to permit him to depart out of their custody and out of their bailiwick, whereby the defendants were prevented from lawfully arresting Bacon, and the writ of the plaintiffs became wholly useless, and they were deprived of the opportunity of obtaining satisfaction of their judgment, and lost the benefit thereof.

The pleas upon which issue was joined were: first, Not Guilty to the whole declaration; secondly, that the defendants could not nor might have taken and arrested the said Anthony Bacon, modo et formâ.

*557] It appears by the record that it was proved upon the *trial that a writ of ca. sa. at the suit of the plaintiffs against Anthony Bacon was delivered to the defendants, they being sheriff of the county of Middlesex, indorsed to levy 323*l.* 3*s.* 4*d.* There was no evidence that information was given by the plaintiffs as to where the defendant Bacon was to be found, or that the defendants could have arrested Bacon before the arrest upon the void writ was made. It was also proved that a parchment was brought to the defendants' office purporting to be a writ issued out of the Court of Exchequer, at the suit of one Juan Antonio Aramburn against the said A. Bacon, indorsed for bail, 780*l.*; that the defendants granted a warrant upon such parchment to James Swayne, an officer; and that the attorney's clerk who brought such parchment informed Swayne where Bacon was to be found; and that Swayne arrested Bacon upon such warrant, having no other, and detained him in custody until an order was made by Mr. Justice COLTMAN for his discharge. It was further proved that the said piece of parchment was not signed and marked in the manner required to be upon writs issued from the Court of Exchequer, and that no præcipe had been filed for such writ in the proper office. That Mr. Justice COLTMAN made an order for the discharge of Bacon at the suit of Aramburn. That after the making of the said order the defendants detained Bacon under the plaintiffs' writ, until Mr. Justice COLTMAN made an order for the discharge of Bacon at the suit of the plaintiffs also. It was likewise proved that Bacon, immediately upon his discharge, left the country. Upon this evidence, Lord DENMAN directed the jury that there had been no arrest at the plaintiffs' suit; that the order of Mr. Justice COLTMAN was no

*558] justification to the sheriff; and that *if the jury believed the evidence, the defendants were liable to the action for negligence in point of law, and that the jury ought to find a verdict for the plaintiffs; and that, if the jury believed the defendants had been guilty of *such*

negligence, the only question for them was the amount of the damages. And upon this direction the defendants' counsel tendered a bill of exceptions, and insisted that the learned Judge ought not to have stated to the jury that if they believed the evidence they ought to find a verdict for the plaintiffs; and further insisted that the defendants had not been guilty of negligence in having proceeded on the said bad pretended writ at the suit of Aramburn instead of the plaintiffs.

The question before this Court arises on the second breach assigned: and that question is, whether Lord DENMAN'S ruling in the respects before mentioned was correct in point of law. And we are of opinion that the direction was correct in point of law, in respect to there having been no arrest at the plaintiffs' suit, and that the order of Mr. Justice COLTMAN was no justification to the defendants in the present action. But we are of opinion that, upon the evidence given in the cause, it was a question of fact for the jury whether the defendants had or had not been guilty of negligence in having arrested Bacon upon the supposed writ at the suit of Aramburn, and in not having arrested him upon the plaintiffs' writ: and we think that the direction of the learned Judge to the jury, that, if they believed the evidence, the defendants had been guilty of negligence in point of law, was erroneous; and that, as the proper question of fact was not left to the jury, there must be a venire de novo.

*The ruling of Lord DENMAN, that the arrest of Bacon upon the supposed writ at the suit of Aramburn was no arrest at the suit of the plaintiff was consistent with the established authorities in the books, and particularly with the case of *Barrett* v. *Price*, 9 Bing. 570, followed by the cases of *Collins* v. *Yewens*, 10 A. & E. 570; *Barrack* v. *Newton*, 1 Q. B. 525, and others. The rule will be found very distinctly laid down by Lord COKE in the *Countess of Rutland's Case*, 6 Rep. 53 *b*, 54 *a*. He says: "The truth of the case of the Countess of Rutland was, that the serjeants who had the sheriff's warrant to arrest the said Countess on the said capias ad satisfaciendum, being fearful that she would be rescued by her servants and friends, and so escape, for which the sheriffs (if she should be arrested on the capias ad satisfaciendum and escaped) would be charged. The Serjeants at Mace advised the said S. to enter a feigned action of 1000*l.* before the sheriffs in London, according to their custom, upon which they would first arrest the said Countess, and by force thereof carry her to the Compter, and then take her body in execution on the capias ad satisfaciendum. And afterwards the said serjeants in Cheapside, with many others, came to the Countess in her coach, and showed her their mace, and touching her body with it, said to her, we arrest you, Madam, at the suit of the said S., which were all the words they used, and thereupon they compelled the coachman to carry the said Countess to the Compter in Wood Street, and at the door thereof the sheriff came, and carried the Countess to his house, where she remained seven or eight days, till she paid the debt. [*559

And it was resolved, that the sheriff, or any other by his authority,
*560] *who makes an arrest of the person of another, ought on the arrest to show at whose suit it is; out of what Court, for what cause he makes it, and when the process is returnable, to the intent that, if it be for any execution, he might pay it and free his body (if he will) from imprisonment; and if it be on mesne process, either to agree with the party, or to put in bail according to law, and to know when he should appear. And therefore it was resolved, that the said *general arrest cannot be said by force of the said writ of execution;* and that the said arrest of the Countess by the Serjeants at Mace of their own heads, without other warrant, is against law, and the said Countess was falsely imprisoned."

Assuming then the law as laid down by Lord DENMAN to be correct, and that the defendant in the original cause was not in lawful custody on the writ of the plaintiffs below, by reason of the wrongful act of the sheriff in arresting on a void writ, or rather no writ at all, the plaintiffs' case against the sheriff is that he was guilty of neglect, and a breach of duty towards them, by causing the defendant Bacon to be arrested on the void writ, whereby he was disabled from holding him in custody on the valid writ then in his possession, and the defendant was therefore discharged, and escaped from the bailiwick, so that he could no longer be arrested there. But, in order to make out that case, it was not enough to show that the writ was *void;* he must show that it was culpable neglect in the sheriff, and *a breach of duty to the plaintiffs* to act upon it: he must show that the defendants knew it to be void, or could with reasonable care have discovered it.

The writ no doubt, being void, would be no defence to the sheriff
*561] in an action of trespass by the person *arrested, whether the sheriff knew it to be void or not, or could not have discovered its defect with ordinary care, because the sheriff, in depriving a man of liberty, acts at his peril; and, if the authority on which he assumes to act is invalid, he is responsible to the party injured; but whether he be guilty of a breach of duty towards the party employing him to execute a writ is quite another question: he only engages to use proper care to arrest, and not wilfully or carelessly to do anything to prevent the arrest; and, if, without any default of the sheriff, the party is not arrested, the sheriff is not liable. If, at the time the sheriff had the plaintiff's writ delivered to him, he had several valid writs in his hands, the sheriff would without doubt perform his duty to the plaintiff if he arrested on one of the other valid writs, for that would be an arrest in point of law on all, and he could not be bound to put the plaintiffs in all the writs to the expense of executing each. Now, if, instead of executing a valid writ, he executed one which he had every reason to suppose to be valid, one, for instance, which, though a forgery, the exercise of skill and caution could not discover to be such, he would

be guilty of no neglect or misconduct. The fact of the writ being really invalid would not be enough to charge the sheriff as to the plaintiff; he gives no guarantee to him that the writ he executes should be valid; he only undertakes to use due care; and it is a question, in every case where he chooses to act on another writ, whether he has used due care in acting upon it, whether he knew, or ought if he had used reasonable care to have known, of the defect.

The second breach in the declaration is framed on the supposition that the sheriff was guilty of a breach of *duty to the plaintiffs in arresting Bacon upon the pretence of a writ, when in truth there was no such writ, and so causing the discharge and departure of Bacon: and, if the breach is well assigned upon the supposition that it purports to charge negligence and want of care in the sheriff in arresting upon the supposed writ, and that is implied by the word "wrongfully," in that view the defendants' liability can only be established upon evidence that in arresting upon the pretence alleged they had been guilty of negligence: and, if so, the summing up is incorrect for the reason before mentioned, that it omits to leave the important question to the jury, whether the sheriff did know or ought to have known that the parchment delivered to him, and upon which he arrested Bacon, was in fact no writ: and therefore there must be a venire de novo upon that ground. [*562

If any doubt arises whether the second breach is well assigned, and if the plaintiff obtains a verdict, it will be proper to consider if the damages should be assessed separately upon each breach.

Venire de novo awarded.(*a*)

(*a*) Reported by H. Merivale, Esq.

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*The QUEEN *v.* The Mayor, Aldermen and Burgesses of the Borough of SANDWICH. [*April* 22, 1846.] [*563

Mandamus, to a borough corporation, recited that the prosecutor had held certain offices of profit within the borough; that under stat. 5 & 6 W. 4, c. 76, he was removed therefrom; that he preferred his claim for compensation to the town council, who disallowed the same; that he then obtained a mandamus requiring the corporation to assess compensation, and to secure the amount by bond; and that they assessed 60*l.* per annum, whereupon he appealed to the Lords of the Treasury, who awarded 112*l.* per annum. The writ concluded by requiring the corporation to give their bond for such last mentioned amount.

Return: 1. That claimant did not hold certain of the said offices. 2. That he had made a former appeal to the Lords of the Treasury, against the original disallowance by the town council, and that the Lords of the Treasury had then assessed only 60*l.* per annum.

To the first part of the return, the claimant pleaded estoppel, stating the assessment in compliance with the former writ, and stating also that the corporation had returned to that writ that they had made such assessment. To the second part of the return, demurrer.

Demurrer, to the plea of estoppel, for duplicity.

Held by the Court of Queen's Bench, that the corporation were estopped from denying that the claimant held the offices in question: That the Lords of the Treasury had jurisdiction to entertain the second appeal and award the 112*l.*: And (per PATTESON and WIGHTMAN, Js.) that the plea was not bad for duplicity.

Held by the Court of Exchequer Chamber, on error, that the Lords of the Treasury had no

jurisdiction to entertain the first appeal, the claim having been altogether disallowed by the town council, and the matter of appeal being therefore not a question of amount but of right: and, consequently, that the Lords might entertain the second appeal, and their award upon it was conclusive.

That the plea was bad for duplicity.

But that the assessment by the corporation under the former mandamus, admitted by the present return, estopped the corporation from denying that the claimant held the offices in question. And that the claimant was entitled to judgment.

MANDAMUS tested 10th June, 1844. The writ recited that, before, and until, and at the time of, the passing of stat. 5 & 6 W. 4, c. 76, and continually from thence, until 1st January, 1836, John Mourilyan was an officer of the borough of Sandwich, in certain offices of profit within the same, that is to say, the office of town clerk of the said borough, and during all the time aforesaid, was, and acted as, town clerk of the said borough, and, as incident thereto, performed the several duties of clerk to the coroner of the borough, treasurer to the Bridge Fund, Liberty Rate and Harbour Fund of the borough; clerk, attorney, solicitor and law agent of the mayor and jurats of the borough as trustees of the said

*564] harbour; attorney, solicitor and law agent to the *corporation of the borough, and to the mayor for the time being, as returning officer of the said town, port, and borough; clerk to the Court of Record of the borough; clerk of the peace, and clerk to the magistrates of the borough, according to the immemorial custom and usage of the said town, port and borough, and that he received the salary, fees, and emoluments of, and pertaining to, the said several offices and duties; and that, on the above mentioned day, he ceased to hold his office of town clerk, and the said several offices and duties incident thereto; and that he was removed therefrom otherwise than for such misconduct as would warrant removal from an office held during good behaviour; and that he had ever since ceased to be such town clerk, and to hold the said several offices incident thereto, and had not been reappointed to them, or any of them; and that thereupon he became entitled to have an adequate compensation, to be assessed by the council, &c., and paid out of the Borough Fund, &c., according to the provisions of the said act of parliament. That, on 8th September, 1836, he preferred his claim for such compensation; and that, on the 27th of the same month, the town council disallowed the same. That in Hilary term, 1842, he obtained a mandamus,(*a*) commanding the defendants to assess the compensation due to him for the loss of his salary, fees, and emoluments of the said several offices which he was in, and held, in the borough, at the time of the passing of the said act, and to secure the amount of such compensation to him by bond, &c., or to show cause to the contrary. That, in pursuance of the said writ, the council, on 18th May, 1842, assessed an

*565] annuity of 60*l.* per annum, as an *adequate compensation to him for the salary, fees and emoluments of the said several offices and

(*a*) *Regina* v. *The Mayor, &c., of Sandwich*, 2 Q. B. 895.

duties. That, on 6th July, 1842, he appealed to the Lords of the Treasury against the assessment; and that, on 9th February, 1844, they awarded him 112*l.* per annum. That the Lords of the Treasury did not include in their award any amount of compensation for, or in respect of, any fees, salary, or emoluments received by him in respect of or from the said duty or office of attorney, solicitor and agent for the mayor as returning officer, nor as treasurer of the Liberty Rate, nor as clerk to the magistrates; and that he did then, and does, freely abandon his claim thereunto, and is content with the said order and sum awarded.

The writ then recited a demand on, and a refusal by, the defendants to execute a bond for payment of the annuity of 112*l.*, and commanded them to execute such a bond, the annuity to commence from the time when Mourilyan was removed from his office of town clerk of the borough, and to continue for his life, according to the said order of the Lords of the Treasury; and to deliver to him the same bond, when executed.

The return stated that the several duties of treasurer to the Bridge Fund and Harbour Fund of the borough, and clerk, attorney, solicitor and law agent of the mayor and jurats as trustees of the harbour, were wholly distinct from, and formed no part of, the duties of the office of town clerk; that the duties of the said offices of treasurer to the Bridge Fund, &c., and clerk, attorney, &c., to the mayor and jurats as trustees of the harbour, were not incident to the office of town clerk; that the said offices of treasurer to the Bridge Fund, &c., and clerk, attorney, &c., to the mayor *and jurats of the borough as trustees of the harbour, were not incident to the office of town clerk; and that said J. Mourilyan did not perform the several duties of treasurer, &c., and clerk, attorney, &c., as incident to the office of town clerk, or to his duties as such town clerk, according to the immemorial custom and usage of the said town, port and borough, or either of them; and that he, J. M., was not under the provisions of the said act of parliament removed from the said office of treasurer, &c., and clerk, attorney, &c. The return further certified that, after the determination of the council to disallow his claim as in the writ mentioned, J. M. appealed, on 10th March, 1837, to the Lords of the Treasury, and that they, on 22d November, 1838, made an order that he should receive an annuity of 60*l.* as compensation for the salary, fees and emoluments heretofore received by him as town clerk of the borough, and in virtue of that and other offices and situations attached to it. And further, that J. M. did not at any time before the issuing of the said within writ give notice to the defendants of his intention to abandon, and that he did not in fact abandon, his claim to compensation for the fees, salary or emoluments in respect of or from the duty or office of attorney, solicitor and agent for the mayor as returning officer, nor as treasurer of the Liberty Rate, nor as clerk to the magistrates, as in the said writ mentioned. [*566

Plea, that defendants ought not to be admitted, or received to make

or plead the said return as to so much thereof as states, &c. (comprising all the averments down to the denial that J. M. was removed from the offices of treasurer, &c., under the provisions of the act), because that in the writ of mandamus, mentioned in the *said writ of mandamus to which this return is made, it was recited, that John Mourilyan was an officer of the borough in certain offices of profit within the same, that is to say, the office of town clerk of the borough, and, during all the time mentioned in the said writ of mandamus to which this return is made, was, and acted as, town clerk of the said borough, and, as incident thereto, performed, amongst other duties, the several duties of treasurer to the Bridge Fund and Harbour Fund, and clerk, attorney, solicitor and law agent of the mayor and jurats of the borough as trustees of the harbour, according to the immemorial custom and usage of the town, port and borough, and that he received his salary, fees and emoluments of and pertaining, amongst others, to the several offices lastly above mentioned, and also that under the provisions of the said act of parliament he was removed from, and ceased to hold, his said office of town clerk, and, amongst others, the several offices lastly above mentioned, incident thereto, on the 1st January, 1836, and that he was removed therefrom otherwise than for such misconduct as would warrant dismissal from an office held under good behaviour, and that he had ever since ceased to be such town clerk as aforesaid, and to hold (amongst others) the said several offices lastly above mentioned incident thereto; as by the record and proceedings thereof now remaining in the said Court will more fully and at large appear; and that, by virtue of and in obedience to the said writ of mandamus, mentioned in the said writ of mandamus to which the said return is made, the defendants did heretofore, and before the making by them of the said return to part whereof this plea is pleaded, to wit, on 18th May, 1842, assess the annuity of 60*l.* as an adequate compen-
*567]
*568] sation to him *for the salary, fees and emoluments of (amongst others) the several offices and duties lastly above mentioned, as in the said writ of mandamus, to which the said return is made, is alleged; and that afterwards, after the making of the said assessment, to wit, on 20th May, 1842, defendants returned that, by virtue of and in obedience to the said writ of mandamus, mentioned in the said writ of mandamus to which the said return to part whereof this plea is pleaded was made, they had assessed the compensation due to him, Mourilyan, for the loss of the salary, fees and emoluments of the several offices, in the said last mentioned writ mentioned, which he was in, and held, in the borough at the time of the passing of stat. 5 & 6 W. 4, c. 76, as by the record, &c., thereof now remaining, &c., will more fully, &c., appear. Whereupon, the said J. Mourilyan, being dissatisfied, on 6th July, 1842, appealed to the Lords of the Treasury, as mentioned in the said writ of mandamus to which the said return is made, to part whereof this plea is pleaded. Verification; and prayer of judgment if defendants ought

to be admitted or received to make or plead that part or any portion of that part of the return in the introductory part of this plea mentioned.

Demurrer to the residue of the return, on the ground that it did not show why the said J. Mourilyan should not be entitled to compensation for the said several offices held by him. Joinder in demurrer.

Demurrer to the plea, on the ground that it does not state or show with sufficient certainty upon what matter the said J. Mourilyan relies as the ground of the estoppel in that plea attempted to be set up; or whether he relies upon the matters in pais, or the matters of record, set forth in that plea, or upon the matters in pais and the *matters [*569 of record together; also, for that the plea is double in setting forth matters in pais as well as matters of record as grounds of estoppel; also that the conclusion of the pleas is insufficient in this, that it does not conclude by relying on the estoppel, or show whether the said J. Mourilyan relies upon the matters in pais, or the matters of record, set forth in the plea, or both such matters together. Joinder in demurrer.

The demurrer was argued in Easter term, 1846,(*a*) by *Whitehurst* on behalf of the Crown, and *Peacock* for the defendants. The arguments are omitted, being subtsantially the same as those in the Court of Exchequer Chamber, post, pp. 571 to 580.

Lord DENMAN, C. J. Upon these pleadings it appears to me that the town council have acknowledged that some compensation is due. By the former writ 60*l.* was awarded to the claimant for compensation; and, on his appealing to the Treasury, that amount was increased to 112*l.* The corporation have now returned to the present writ, that Mr. Mourilyan did not hold all the offices for which the compensation was awarded. But in the return to the former writ they stated that they assessed the sum of 60*l.* for those offices.

PATTESON, J. The error was in the return which the corporation made to the former mandamus. The present return consists, in fact, of two parts. It denies that Mr. Mourilyan exercised the offices now in question, as incident to his town clerkship; introducing the *words [*570 "according to the immemorial custom and usage of the said town, port and borough," which, however, seem to be immaterial; and, secondly, it states that Mr. Mourilyan appealed to the Treasury, and had 60*l.* assessed as compensation for his town clerkship and other offices attached to it; and, that he did not at any time abandon his claims to compensation for the offices of attorney and solicitor for the mayor as returning officer, &c. But to this Mr. Mourilyan answers, that the council are estopped from denying that the first-mentioned offices are attached to the town clerkship, because they did not on that ground resist the original writ. I think that answer a good one.

It has been argued that the plea of estoppel is double, but I think

(*a*) April 22d.

that objection is not well founded. The return therefore is bad, and the plea good.

WILLIAMS, J., concurred.

WIGHTMAN, J. I agree, thinking the corporation estopped by their former proceeding. The objection now raised ought to have been taken when the first writ issued. I entertained some doubt of the goodness of the plea, on the alleged ground of duplicity; but on this point I agree with my brother PATTESON.

Peremptory mandamus awarded.(a)

(a) Reported by H. Merivale, Esq. See the next case.

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*571] *In the Exchequer Chamber.

(Error from the Queen's Bench.)

The Mayor, Aldermen and Burgesses of the Borough of SANDWICH v. The QUEEN.

For syllabus, see p. 563, antè.

ERROR was brought on the above judgment. There was the common assignment of errors, and it was also assigned for error that judgment ought to have been given that the plea was not sufficient; and that the residue of the return in the demurrer of the prosecutor was sufficient; that the writ was not sufficient; and that the prosecutor could not plead to a part of the return and demur to the residue. Joinder in error.

Peacock for the plaintiffs in error.(a) The mandamus recites that, in September, 1836, the claimant preferred his claim for compensation, and the town council disallowed the same; that a writ of mandamus issued in 1842 to the town council commanding them to assess compensation to the claimant, and to secure the amount thereof by bond; that they did accordingly award him 60*l.* a year; that he then appealed to the Lords of the Treasury, who awarded him 112*l.* a year; that in that sum nothing was included for the office of attorney to the mayor, as returning officer, or for the office of treasurer of the Liberty Rate, or of

*572] clerk to the *magistrates; and that the claimant abandoned his claim thereto. The return, first, denies that some of the offices mentioned in the writ, viz., those of the treasurer to the Bridge Fund and Harbour Fund, and of attorney to the mayor and jurats as trustees of the harbour, were incident to the office of town clerk, or that the town clerk had performed the duties thereof according to immemorial usage. Secondly, it supplies an intermediate fact, omitted in the writ, that, between the times of the disallowance by the town council in 1836 and of the issuing the recited mandamus of 1842, the claimant (in 1837)

(a) The argument was commenced in last Hilary vacation (February 5th), and continued in this vacation (May 12th and 13th).

appealed to the Lords of the Treasury against that disallowance, and that they awarded him 60*l.* a year as compensation. To the former part of this return there is a plea of estoppel, on the grounds, that the town council have already, in compliance with the mandamus of 1842, assessed compensation in respect of the very offices which the present return denies to have been incident to the office of town clerk, and also that they returned, to that former writ, that they had assessed such compensation. To the latter part of the return there is a demurrer. There is also a demurrer to the plea of estoppel.

The plaintiffs in error contend that the present writ is bad; that the return is good, because the Lords of the Treasury had jurisdiction to entertain the first appeal, and their award of 60*l.* a year was conclusive, within stat. 5 & 6 W. 4, c. 76, s. 66; and that the plea of estoppel is bad for duplicity, uncertainty, and other informalities.

First. The writ is bad. It does not state that the several offices mentioned were offices of profit in respect of which compensation could be claimed within sect. 66. The only office so described is the office of *town clerk: and yet in the mandatory part of the recited writ of 1842, on which the present writ is founded, the corporation are commanded to assess compensation for the several offices which the claimant held. As a matter of law compensation can be claimed for the office of profit only; and the incidents to that office constitute no part of the title to compensation, but are part of the circumstances of the case which affect the amount merely. [*573

Secondly, as to the plea of estoppel. [WILDE, C. J. It is material to consider whether the former writ left it open to the town council to assess compensation for such offices as might, on investigation, turn out to be incident to the principal office, or whether it treated certain specific offices as so incident. In the latter view, the corporation may now be estopped by their obedience to the former writ.] The writ ascertained the specific offices for which compensation was to be assessed. The traverse, therefore, if it is now open to the corporation to plead it, is a material part of the return; and the question is whether they are estopped. Upon this point it is to be observed that the former writ did not command the corporation merely to assess compensation, so as to give the claimant an opportunity of appealing to the Lords of the Treasury if he were dissatisfied with the compensation assessed, but, further, also to secure that amount by bond. The claimant, then, had no right of appeal; and the corporation, whose assessment, by the terms of the writ, was to be final, had no occasion to return, as they do, now that a second writ issues commanding them to give a bond for the amount as enlarged on appeal, that the offices in question were not incident to the principal office. *The former return must be taken with reference to the former writ, which by its terms precluded an appeal by the claimant, and also compelled the corporation to give their bond for [*574

the amount of their own assessment; and they cannot be estopped by doing that which they were compelled to do. In point of form, also, the plea is bad, for it does not show whether the estoppel consists in the fact of assessment, or in the return of the assessment, in matter in pais, or matter of record, or both jointly; in which last case the plea is bad for duplicity. The conclusion of the plea ought to show the matter of estoppel with certainty; and such a plea must be certain in every particular: Stephen on Pleading, 390, 442, 5th ed. The corporation cannot be estopped by the mere assessment; for it was made by the town council, and not by the corporation at large, against whom the estoppel is set up. The former writ, indeed, ought to have been directed to the town council. This question was raised in *Regina* v. *Ledgard*, 1 Q. B. 616, where *Regina* v. *The Mayor, &c., of Hereford*, 2 Salk. 701, was cited; in which case POWELL, J., said that the writ "ought to be directed to those, and to those only that are to obey the writ." To this effect is also Com. Dig. *Mandamus* (C 1).

Lastly. The Lords of the Treasury had jurisdiction to make their first award of 60*l.* a year; and that award is conclusive by stat. 5 & 6 W. 4, c. 76, s. 66. Where their decision is against the claimant, as in *Regina* v. *The Mayor, &c., of Harwich*, 2 Q. B. 909, it may be said that, as they have awarded him nothing, they must have decided on a question of right and title, and not on a question of mere amount. But that they have *jurisdiction to decide in favour of a claim, after its total disallowance by the town council, is clear from *Regina* v. *The Lords of the Treasury* (*In re Loxdale*), 10 A. & E. 179, and *Regina* v. *Mayor, &c., of Carmarthen*, 11 A. & E. 9. In *Regina* v. *The Corporation of Warwick*, 10 A. & E. 386, and in *Regina* v. *Mayor, &c., of Newbury*, 1 Q. B. 751, it was clear they had no jurisdiction, for the question was as to the propriety of an officer's removal. Can it be said they have jurisdiction if the town council assess a farthing, but not if the council assess nothing? The town council might have disallowed the present claim because they did not believe that the claimant had ever received any fees or salary; if so, the Lords of the Treasury had to decide a question of amount only. [PARKE, B. The corporation rely on the first award by the Lords of the Treasury as conclusive; the return therefore should show the jurisdiction. WILDE, C. J. It appears the council disallowed the claim; that must mean the whole claim.] It was the claimant's appeal; it must be taken against him that there was jurisdiction to decide the appeal. There is no authority against the plaintiffs in error, except the judgment on making the rule absolute for the former writ in this very case: *Regina* v. *Mayor, &c., of Sandwich*, 2 Q. B. 895.

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He then cited *Regina* v. *The Corporation of Poole*, 7 A. & E. 730, as showing that the provisions of stat. 5 & 6 W. 4, c. 76, s. 66, did not apply to such an office as treasurer to the Harbour Fund; and stats. 23

G. 2, c. 55, 32 G. 3, c. 74, 1 stat. 47 G. 3, c. xxii. (local and personal), and 9 G. 4, c. lxxxv. (local and personal, public), to show *that the duties of treasurer to the Bridge Fund, and Harbour Fund, could not have been performed by the town clerk according to immemorial usage. [*576

Whitehurst, contrà. In compliance with the first writ of mandamus, the town council awarded an annuity of 60*l.* to the claimant: he was dissatisfied, and, the amount only being in dispute, appealed to the Lords of the Treasury, who awarded an annuity of 112*l.* Upon this the present mandamus issued, requiring the corporation to execute a bond for the amount last mentioned. To this writ a return is made, which consists of three branches: first, that some of the offices, mentioned in the writ, were not incident to the office of town clerk; secondly, that the claimant appealed against the entire disallowance of his claim in 1837, and the Lords of the Treasury awarded him an annuity of 60*l.*, which award is conclusive; and, thirdly, that he did not give due notice that he had abandoned compensation in respect of certain offices. To the first branch of the return, there is a plea of estoppel, and to the residue a demurrer.

It is clear, on reference to the two writs, that the only office of profit in respect of which a legal right to compensation is asserted, within stat. 5 & 6 W. 4, c. 76, s. 66, is that of town clerk; and that the other offices or duties are mentioned but as incidents, which may affect the amount of compensation only. The first branch of the return, therefore, can be no answer, for it applies itself not to the right, but to the amount merely. Suppose, however, that the adjuncts are to be taken as substantive offices, then, though the return may be good, the corporation are estopped from making it. An estoppel *appears upon the record, independently of the plea of estoppel. The plaintiffs in error are estopped by their previous conduct. They assessed compensation in compliance with the first writ, and, by so doing, induced the claimant to appeal to the Lords of the Treasury, and then apply to this Court for the present writ. The validity of such an estoppel is established by numerous cases. Matter of estoppel in pais may be pleaded; *Sanderson* v. *Collman*, 4 M. & G. 209. First, as to the estoppel by conduct, which has here induced the claimant to alter his situation, *Bowman* v. *Taylor*, 2 A. & E. 278, *Sheffield & Manchester Railway Company* v. *Woodcock*, dictum of PARKE, B., 7 M. & W. 574, 582, *Goldie* v. *Gunston*, 4 Campb. 381, *Pickard* v. *Sears*, 6 A. & E. 469, *Gregg* v. *Wells*, 10 A. & E. 90, *Coles* v. *The Bank of England*, 10 A. & E. 437, *The Cheltenham and Great Western Union Railway Company* v. *Daniel*, 2 Q. B. 281, *Harmer* v. *Davis*, 1 B. Moore, 300, S. C. 7 Taunt. 577, are authorities; so are the cases of certificated paupers, *Rex* v. *Bray*, Bur. S. C. 259, *Rex* v. *Lubbenham*, 4 T. R. 251; and also the ordinary cases of estoppel between landlord and tenant. Again, [*577

the plaintiffs in error are estopped by having allowed the time to go by for setting up their objection on the record; *Bradley* v. *Eyre*, 11 M. & W. 432;(a) *Rex* v. *The Company, &c., of the Nottingham Old Water Works*, 6 A. & E. 355.(b) The town council had exclusive jurisdiction to determine whether the claimant held the offices in question; they assessed compensation on the assumption that he did hold them. Can
*578] they *now say he did not hold them? There must be an end of litigation at some stage of the proceedings. Suppose they had given their bond for the amount, or had even suffered judgment on their bond, could they still set up the objection? It is said that they were compelled to obey the former writ, and that there cannot, therefore, be any estoppel. But it was not a peremptory mandamus: the return now made might have been made to that writ.

The estoppel by assessment appears independently of the plea; the estoppel by the return of the assessment does not appear except upon the plea. It is necessary, therefore, to consider the plea. It is not double. It states a connected series of proceedings, as in *Rowles* v. *Lusty*.(c) Such a plea need not conclude by asking judgment of the Court whether the party should be heard "against his deed" or "against the record." All that is necessary is, that the conclusion should show that the estoppel is relied on: note (4) to *Veale* v. *Warner*,(d) Doctrina Placitandi, 158. [PARKE, B. As to the duplicity; the return would have been an estoppel without the assessment.]

The estoppel may prevail, notwithstanding it may appear from certain statutes that any particular office could not have existed immemorially; for the Court cannot, in the absence of proper averments, see that the offices on the record and in the statute are the same. And the words "immemorial usage" on this record are not to be taken as meaning more than long usage.

As to the want of notice that compensation for some of the offices was abandoned, it is enough that it is now abandoned on the record.

*WILDE, C. J. It is unnecessary to answer the objection made
*579] to the direction of the former writ.(e)

Peacock, in reply. [WILDE, C. J. We are all of opinion that the first decision of the town council was a total disallowance of the claimant's right, and, therefore, that the Lords of the Treasury had no jurisdiction to entertain the appeal against that decision: that their award of 60*l.* a year is wholly immaterial.] The disallowance of the town council may have been on the ground that no profit was made by the office. [WILDE, C. J. We are against you on that point, and are satisfied that the Court of Queen's Bench was right. We also think the plea is bad for duplicity. It is for the plaintiffs in error to support the return.] All that

(a) And see *Philipson* v. *Earl of Egremont*, 6 Q. B. 587.
(b) See p. 373.
(c) 4 Bing. 428.
(d) 1 Wms. Saund. 325 *a* (6th ed.)
(e) Antè, p. 574.

the town council did was to assess compensation for the purpose of giving a bond; and it is said that, by going so far, they have estopped themselves from denying that the claimant is entitled to compensation in respect of certain offices. [MAULE, J. You might have said in your former return, as you do say in this, that no compensation could be claimed for the offices in question. The writ commanded you to assess the compensation due for certain offices, and you assessed a certain sum for such compensation. ROLFE, B. The assessment of 112*l.* a year is, in effect, your assessment; for you did that which gave the right to a further inquiry before the Lords of the Treasury. PARKE, B. You admitted he was entitled to something, and were too niggard in your award. MAULE, J. Your assessment let in the further assessment by the Lords of the Treasury, just as the finding 40*s.* costs by the jury lets in the taxation, by the *Court, of costs de incremento.] It has [*580 been argued for the claimant, that the offices in question were incidents only: this writ, therefore, must be bad in demanding compensation for incidents. [PARKE, B. If you admit that the corporation are bound to pay 60*l.* a year, you must admit they are bound to pay 112*l.* a year. MAULE, J. You might have made any answer you pleased to the former writ.]

WILDE, C. J. We are of opinion that the assessment made by the town council, in pursuance of the first writ, binds the corporation conclusively to give a bond for adequate compensation to the claimant; and that the decision of the Lords of the Treasury, upon the appeal against that assessment, rides in upon it by ascertaining finally what is the amount of adequate compensation, and so substituting 112*l.* a year, for 60*l.* a year, as the amount for which the bond is to be given. By compensation is meant adequate compensation, either as originally assessed by the town council, or as the assessment is amended by the Lords of the Treasury.

MAULE, CRESSWELL, and WILLIAMS, Js., and PARKE, ROLFE, and PLATT, Bs., concurred. Judgment affirmed.(*a*)

(*a*) Reported by H. Davison, Esq.

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*[The publication of the three following cases has been postponed till the decision of *Jones* v. *Robin*, in the Exchequer Chamber, post, p. 620.] [*581

CATHERINE JONES *v.* BRYAN JOHN ROBIN. [*May* 3, 1845.]

A claim of common pur cause de vicinage pleaded in respect of a private estate, and alleging such common to exist by custom, is bad. And, therefore, a right to such common is not shown by alleging that the farm of A. and the farm of B. were, and from time whereof, &c., had been, contiguous to each other, and not separated by any fence, and that the sheep, from time to time put on the land of A. to feed, "from time immemorial, have gone, escaped," &c., "and have been used and accustomed to go," &c., therefrom into the land of B., and to intermix there and to feed with sheep from time to time feeding on B.'s land; and in like

manner, &c.; alleging in similar form that the sheep put on B.'s land have gone, &c., therefrom, and been used to go, &c., upon the land of A., and to intermix, &c. And this objection to a replication was held good on demurrer to the rejoinder.

TRESPASS for seizing, distraining and impounding plaintiff's sheep.

Plea 2. As to seizing, &c., four of the sheep, that one John Robin, before and at the time when, &c., was lawfully possessed of a certain close, being a certain plantation within and part of a certain farm of the said John Robin, called Tan y Graig, situate in the parish of Nantglyn in the county of Denbigh; and, because the said sheep, in the introductory part, &c., were wrongfully in the said close, &c., eating and depasturing, &c.: justification, that defendant, as the servant and by authority of John Robin, took the four sheep damage feasant, &c. Verification.

Plea 3. As to seizing, &c., other three of the sheep, &c., that one John Robin, before and at the said time when, &c., was lawfully possessed of a certain other close, within and parcel of a farm of the said J. R., called Tan y Graig, and near to a certain plantation, and situate in the parish of Nantglyn in the county of Denbigh; and, because the said sheep, &c.: justification, not materially differing from that in the former plea.

Replication. That the said farm of Tan y Graig, in the pleas men-
*582] tioned, and whereof the said close or *plantation of the said J. Robin, in the said second plea mentioned, and the said close of the said J. R., in the said last plea mentioned, were and are part and parcel as mentioned in those pleas and always have been part and parcel, at the said times, in those pleas mentioned, when, &c., lay, and from time immemorial hath lain, and still doth lie, contiguous and next adjoining to a certain other farm called Nant Heilyn, containing divers, to wit, 100 acres of land situate and being in the parish of Pentre Voelas in the county of Denbigh, and hath never been separated or divided from the said farm called Nant Heilyn by any inclosure, hedge or fence whatsoever sufficient to prevent sheep from time to time feeding and depasturing in either of the said farms called Nant Heilyn and Tan y Graig from erring or escaping from the one of the said farms into the other of the said farms; nor have the said closes of the said J. R., or either of them, ever been separated or divided from the residue of the said farm called Tan y Graig by any inclosure, hedge or fence sufficient to prevent sheep from time to time feeding and depasturing in or upon the said residue of the said farm called Tan y Graig, or which had escaped into the same from the said farm called Nant Heilyn, from erring or escaping into the said several closes of the said J. R., or to prevent sheep feeding or depasturing in or upon the said closes or either of them from erring or escaping therefrom into the residue of the said farm called Tan y Graig and thence into the said farm called Nant Heilyn: and the plaintiff in fact says that the sheep from time to time during all that time duly put in and on the said farm called

Nant Heilyn to feed on the grass there then growing from time immemorial *have gone, escaped and rambled, and have been used and accustomed to go, &c., therefrom into the said farm called Tan y Graig, [*583 in which the said sheep were so taken and distrained, and into the said several closes of the said J. R., so being part and parcel thereof, and to intermix there and to feed with sheep from time to time feeding on the grass growing in and on the said last-mentioned farm and closes; and in like manner the sheep from time to time during all that time duly put into and on the said farm called Tan y Graig, in which, &c., or into the said closes or either of them, to feed on the grass there then growing, from time immemorial have gone, escaped and rambled, and have been used and accustomed to go, escape and ramble, therefrom into the said farm called Nant Heilyn, in the county aforesaid, and to intermix there and to feed with the sheep from time to time feeding on the grass growing in and on the said last mentioned farm. Averment, that Charles Wynne Griffith Wynne, Esq., before the said times when, &c., or either of them, viz. on 30th November, A. D. 1841, being seised in his demesne as of fee of the said farm called Nant Heilyn, with the appurtenances, demised the same to plaintiff, habendum to plaintiff, &c.; demise for a year thence next, and so from year to year, &c.; by virtue of which demise, &c.; entry by plaintiff and possession from thence hitherto; and that plaintiff, being so possessed, afterwards, and before either of the times when, &c., to wit, on, &c., put her sheep, in the declaration mentioned, into and upon Nant Heilyn to depasture the grass there then growing, as it was lawful, &c., for the cause aforesaid; and the said sheep remained there depasturing, &c., until the escape thereof hereinafter mentioned: *Averment, that, the said sheep so being [*584 put in and upon the said farm called Nant Heilyn for the purpose aforesaid, and the said farm called Tan y Graig so being and lying contiguous thereto, and not separated, &c., therefrom by any inclosure, &c., sufficient to prevent sheep depasturing in plaintiff's said farm from escaping therefrom into the said farm called Tan y Graig, the said sheep of plaintiff afterwards, and just before the times when, &c., viz. on, &c., of their own accord and without the knowledge or consent of plaintiff, went, escaped, &c., from and out of the said farm of the plaintiff called Nant Heilyn into the said farm called Tan y Graig, in which, &c., and into the said closes of J. R. in the second and last pleas mentioned, so being part and parcel of the last mentioned farm, the said several closes, and each of them, not being then separated or divided from the residue of the said farm called Tan y Graig by an inclosure, &c., sufficient to prevent sheep depasturing in or upon the said residue of the said farm from erring or escaping therefrom into the said closes or either of them, and intermixed and fed with the sheep there then feeding on the grass there then growing, and remained and continued in the said closes being part and parcel of the said farm called Tan y Graig, in which, &c., on

the occasion aforesaid, without the knowledge of plaintiff, depasturing the grass there, until defendant, before plaintiff had or could have any notice that the said sheep were in the said closes of J. R., in which, &c., to wit, at the said time when, &c., of his own wrong seized, took and distrained, &c., and unjustly impounded, &c., in manner, &c. Verification.

Rejoinder. That, although true it is that the said C. W. G. Wynne was seised of and in the said farm called Nant Heilyn with the appurte-
*585] nances in his demesne as *of fee, and demised, &c., to plaintiff in manner and form as in the replication to the second and last pleas alleged, yet the said other matters in the said replication respectively alleged are not true in substance or in fact. Conclusion to the country.

Demurrer, assigning for causes that the rejoinder is multifarious; that it puts in issue immaterial allegations; that the custom, prescription or usage set up in the replication ought to have been traversed specifically in terms following the language in which the same is pleaded, or by a formal traverse in the ancient and approved language of pleading; that the rejoinder is novel and of doubtful effect; that it amounts to De injuriâ absque residuo causæ, and should have been so pleaded; and that it is improper, because the plaintiff claims an interest under the usage, custom or prescription set forth in the replication.

Joinder in demurrer.

The case was argued in Trinity term, 1844,(*a*) by *E. V. Williams* for the plaintiff, and *Kelly* for the defendant. *Kelly* abandoned the rejoinder; (*b*) but contended that the replication was bad.

The judgment in this Court, and the arguments and judgments in the Exchequer Chamber, post, p. 620, render it unnecessary to report the arguments in this stage of the case.(*c*) *Cur. adv. vult.*

*586] *Lord DENMAN, C. J., in Easter term (May 3d, 1845), delivered the judgment of the Court.

This case arises on demurrer to the rejoinder; but, on the argument, the rejoinder was abandoned; and the question is as to the validity of the replication.

It alleges that the farm of the plaintiff and that of the defendant have immemorially adjoined each other, not separated by any fence sufficient to turn sheep. It then states that the sheep, from time to time during all that time duly put in and on the said farm called Nant

(*a*) May 31st. Before Lord DENMAN, C. J., PATTESON and WILLIAMS, Js. COLERIDGE, J., had left the court.

(*b*) E. V. WILLIAMS, as to the rejoinder, referred to Stephen on Pleading, p. 460 (5th ed.), ch. 2, sect. 6, rule ii., and *Mitchell* v. *Cragg*, 10 M. & W. 367.

(*c*) The following authorities not mentioned in the Exchequer Chamber or in the judgment in this Court, were referred to on the present argument. *Anonymous Case*, 3 Dyer, 316 b, pl. (4); Yearb. Pasch. 8 E. 4, fol. 5 A, pl. 14; 4 Vin. Abr. 588, tit. *Common* (K), pl. 9; Aston, Placita Latinè Rediviva, 507, citing Rot. 452, 10 H. 8; Winch's Entries, 1085, 1086; Com. Dig. *Pleader* (3 M, 29).

Heilyn (plaintiff's) to feed on the grass there then growing, from time immemorial have gone, escaped and rambled, and have been used and accustomed to go, escape and ramble, therefrom into the said farm called Tan y Graig (defendant's), in which the said sheep were so taken and distrained, and into the said several closes of the said John Robin, so being part and parcel thereof, and to intermix there and to feed with sheep from time to time feeding on the grass growing in and on the said last mentioned farm and closes: and in like manner, &c. (stating the mutuality as to the other farm).

This is the ordinary form in which common of vicinage is pleaded, if you substitute the word "waste" for "farm." And, whether common of vicinage be a right or a mere excuse for a trespass, the form of pleading it is the same. The question, therefore, seems to be, whether the law on this subject, applicable to adjoining wastes lying undivided, be applicable also to *adjoining lands held in severalty and lying undivided. It is urged that in either case the common may be put an end to by inclosure at the will of either party; and that in its nature it may as well exist between private owners as between lords of manors. [*587

No doubt, it may be put an end to by inclosure, as appears from *Tyrringham's Case*, 4 Rep. 36 *b*, 38 *b*, 39 *a*, and *Corbet's Case*, 7 Rep. 5 *a*, and other authorities; in all of which it is treated rather as an excuse for a trespass than as a right; which indeed would almost follow from the power to put an end to it, and from the circumstance that he who has such common of vicinage cannot, according to the better opinion, put his cattle at once on the neighbouring waste, but only on the waste which lies in the manor where his own lands are. Common of shack, as stated in *Corbet's Case*, is nothing like what is pleaded here: for that is where various arable lands lie interspersed; here the farms are merely adjoining, not interspersed at all. If the right or excuse here pleaded can be supported, it must be by analogy to what is called common pur cause de vicinage. Now it must be observed that it is not pleaded as a prescription, but as a custom. No doubt, it was competent to the owners of the respective farms to create such an usage by grant; and possibly it might be supported as a prescription. A case in Bro. Abr., *Prescription*, pl. 71, was referred to, where it is said that a man may prescribe that, if his beasts escape into the land of B., B. cannot distrain them or have an action. The reason is queried; and well it may be: but, at all events, it is said he may *prescribe*. We *believe that this is the first time that any supposed right between two individuals has been pleaded as matter of custom. Where the wastes of adjacent manors lie open together, the lords in respect of their ownership of the soil of the wastes, the copyholders in respect of their customary rights, and the freeholders in respect of their prescriptive rights, over the wastes, have some common interest as to the stocking of those wastes: [*588

and it may well be that a general custom and usage for the convenience of all parties may have existed from time immemorial as to straying of cattle, which custom and usage would not have had its origin in any actual contracts, it not being at all probable that many persons with such different interests should have entered into actual contracts on the subject, but in a tacit acquiescence of all for their mutual benefit. No such reasons apply in the case of two farms held in severalty as here: and, in the absence of any precedent for such a custom, we are of opinion that it is not valid: and then the defendant is entitled to the judgment of the Court. Judgment for defendant.(a)

(a) Judgment affirmed on error in the Exchequer Chamber, *Jones* v. *Robin*, post, p. 620. See also the next two cases.

*589] *PRICHARD v. LLEWELLYN POWELL, HOWELL POWELL, LEWIS, and DAVIES.(a) [*May* 3, 1845.]

To avowry for damage feasant on a common, D., common pur cause de vicinage is well pleaded in bar by alleging immemorial common pur cause de vicinage between commons P. and D., for cattle duly put on said commons, and that plaintiff has, for thirty (or sixty) years had right of common on P.

Reputation may be given in evidence in support of the immemorial right of common pur cause de vicinage so pleaded.

REPLEVIN, for taking, at the parish of Ystradgunlais, in the county of Brecknock, in a common there, called Black Mountain, the cattle, &c., of plaintiff, to wit, forty sheep, &c.

Avowry by Llewellyn Powell, and cognisance by the other defendants as his bailiffs and servants: That, before and at the time when, &c., L. Powell was and still is the lawful possessor and occupier of a certain messuage, closes and land, with the appurtenances, situate, &c., in the said county, to wit, in the parish of Ystradgunlais, in the county aforesaid, to wit, a certain farm there called Glynllechissa; and that the occupiers for the time being of the said messuage, closes and land now have, and for and during the full period of thirty years next before the commencement of this suit have of right had, and enjoyed without interruption, and still of right ought, &c., common of pasture in, upon and throughout the said place in which, &c., called Black Mountain, for all his and their commonable cattle levant and couchant in and upon the said closes and land so in the possession of defendant L. P. as aforesaid, every year, at all times of the year, as to the said last mentioned closes and land belonging and appertaining. That, because the said cattle, &c., in the declaration mentioned, at the said time when, &c., were *590] *in and upon the said place in which, &c., depasturing, &c., and doing damage there, so that defendant L. P. could not have or enjoy his said common of pasture there in so ample a manner, &c.: avowry and cognisance of the taking as for and in the name of a distress for the damage.

(a) See the preceding and the next two cases.

There was a second avowry and cognisance, laying the right in the occupiers, for sixty years; and a third prescribing for the same right as immemorial.

The plaintiff pleaded in bar:

First, a plea to all three avowries and cognisances; and, secondly, thirdly and fourthly, pleas to the first, second and third cognisances respectively. These four pleas led to issues in fact, not material to the points decided in banc.

Fifthly, to all the three avowries and cognisances: That the said place in which, &c., in the declaration mentioned in the parish of Ystradgunlais, in the county, &c., that is to say the said common called the Black Mountain, in which, &c., at the said time when, &c., lay, and from time immemorial had lain, and still does lie, contiguous and near adjoining to a certain other common in the parish of Llanddausaint in the county of Carmarthen, that is to say a certain common known also by the name of the Black Mountain, containing divers, to wit, 1000 acres, and had never been divided or separated from the last mentioned common in the parish of L., that is to say from the said common called Black Mountain in the county of C., by any inclosure, hedge or fence whatsoever sufficient to prevent cattle from time to time feeding and depasturing on the said common in the said parish of L., that is to say the common called Black Mountain, from erring and *escaping therefrom into the said common in the said parish of Y., that is to say the said common called Black Mountain, in which, &c., and that the said cattle from time to time during all that time duly put on the said common in the said parish of L., that is to say the said common called Black Mountain, to feed on the grass there then growing, and to use the said common of pasture in and upon and throughout the said last mentioned common, from time immemorial had gone, escaped and rambled, and had been used and accustomed to go, &c., therefrom into the said common in the said parish of Y., to wit, the said common called Black Mountain in which, &c., and to intermix there and feed with cattle from time to time feeding on the grass growing in the said last mentioned common: and in like manner the cattle from time to time during all that time duly put into the said common in the said parish of Y., to wit, the common called Black Mountain in which, &c., to feed on the grass there then growing, and to use the said common of pasture in, upon and throughout the said common in the said parish of Y., to wit, the common called the Black Mountain, from time immemorial had gone, escaped and rambled, and had been used and accustomed to go, &c., therefrom into the said common in the said parish of L., to wit, the common called the Black Mountain, and to intermix there and feed with cattle from time to time feeding on the grass growing on the said last mentioned common. That plaintiff, before and at the said time when, &c., was and still is the occupier of a certain messuage, and of divers, to [*591

wit, 100, acres of land, with the appurtenances, situate and being in the
*592] parish of *L. aforesaid; and that plaintiff, and all others the occupiers for the time being of the said last mentioned messuage and land now of the plaintiff with the appurtenances, for the full period of thirty years next before the commencement of this suit and the said time when, &c., without interruption and of right had had, and been used and accustomed to have, and plaintiff still without interruption and of right ought to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, common of pasture in, upon and throughout the said common in the said parish of L., to wit, the said common there called Black Mountain, for all his sheep levant and couchant in and upon the said land of the plaintiff with the appurtenances, every year and at all times of the year, as to the said messuage and land with the appurtenances belonging and appertaining. That plaintiff, being such occupier as aforesaid, just before the said time when, &c., to wit, on, &c., did put and cause to be put the said cattle, &c., in the declaration mentioned in and upon the said common in the said parish of L., to wit, the said common called Black Mountain, being plaintiffs' commonable sheep levant and couchant in and upon the said land of the plaintiff, to use the said common of pasture of the plaintiff, and to feed on the grass there growing: and that, the said cattle, &c., of plaintiff so being put and being in the said common in the said parish of L., that is to say, &c., for the purpose aforesaid, and the said common in the said parish of Y., to wit, the said common called Black Mountain in which, &c., so being and lying contiguous thereto, and not separated or divided therefrom by
*593] any *inclosure, hedge or fence whatsoever, the said cattle, &c., of plaintiff afterwards, and just before the said time when, &c., to wit, on, &c., of their own accord, and without the knowledge and consent of plaintiff, went, escaped and rambled from and out of the said common in the said parish of L., that is to say the said common called Black Mountain, into the said common in the said parish of Y., to wit, the said common there called Black Mountain in which, &c., and intermixed and fed with the cattle then there feeding on the grass, and remained and continued in the said common in the parish of Y., to wit, &c., in which, &c., on the occasion aforesaid, without the knowledge of the plaintiff; and then necessarily and unavoidably a little trod down and depastured, &c., and necessarily, &c., did damage, &c., as in the avowries and cognisances mentioned. Verification.

Sixthly, to all the three avowries and cognisances, a plea in bar, averring an enjoyment of pasture in Llanddausaint for sixty years; and in other respects corresponding with the fifth plea.

Replication, by defendant Llewellyn Powell, to the fifth and sixth pleas: That, after the said cattle in the declaration mentioned had been so put in and upon the said common in the parish of Llanddausaint, and

before the time when, &c., the same cattle, &c., and each and every of them, had entered into and upon the said common in which, &c., with the consent and knowledge of plaintiff; and that the same cattle, &c., and each and every of them, so remained and continued in and upon the said place in which, &c., so doing damage there as aforesaid, with such knowledge and consent as aforesaid, from the time of such entry continually until the same time when, &c.; without this, that the said cattle, *&c., of their own accord, and without the knowledge and consent of plaintiff, went and escaped and rambled from and out of [*594 the said common in the said parish of Llanddausaint into the said common in which, &c., and remained and continued there without the knowledge of the plaintiff, in manner and form, &c.: conclusion to the country. Issue thereon.

Replication, by defendant Lewis, to the fifth and sixth pleas: That the cattle from time to time duly put on the said common in the parish of Llanddausaint, to feed on the grass there growing, and to use the said common of pasture therein, from time immemorial had not gone, escaped or rambled, nor had they been used or accustomed to go, escape or ramble, therefrom into the said common in which, &c., and to intermix there and feed with the cattle from time to time feeding on the grass growing in the last mentioned common, in manner and form, &c.: conclusion to the country. Issue thereon.

Replication, by defendant Howell Powell. To the fifth plea: a traverse of plaintiff's enjoyment of common in Llanddausaint for thirty years. Issue thereon. To the sixth plea: a traverse of plaintiff's enjoyment of common in Llanddausaint for sixty years. Issue thereon.

Replication, by defendant Davies, to the fifth and sixth pleas. That, after the said cattle, &c., had so gone, escaped and rambled into the said common in which, &c., as in the pleas respectively mentioned, plaintiff had knowledge and notice thereof; and that more than a reasonable time had elapsed after plaintiff had such knowledge and notice as last aforesaid, and before the said time when, &c., for his, plaintiff's, *removing the said cattle, &c., and each and every of them, from and out of the said common in which, &c.; without this that the [*595 said cattle, &c., or any or either of them, at the said time when, &c., were remaining or continuing in or upon the said common in which, &c., without the knowledge of plaintiff, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before MAULE, J., at the Brecknockshire Spring Assizes, 1843, the plaintiff, to prove the common pur cause de vicinage, offered evidence of reputation, which was objected to, but admitted. A verdict was found for the plaintiff on the issues upon the fifth and sixth pleas, and for the defendants on the other issues.

In Easter term, 1843, *Chilton*, on behalf of the defendants, obtained

a rule nisi for a new trial on the ground of misdirection,(a) and of the reception of improper evidence, and of the verdict being against the weight of evidence; and also for judgment non obstante veredicto, or for arrest of judgment, on the issues upon the fifth and sixth pleas.

In Michaelmas term, 1843,(b)

Evans and *Peacock* showed cause. First, as to the evidence. It was held in *Weeks* v. *Sparke*, 1 M. & S. 679, that evidence of reputation might be given to prove a prescriptive right in the plaintiff to use for tillage with corn, during part of the year, a place where defendant
*596] claimed, on the record, a right of common for cattle *levant and couchant, which last right appeared also to be claimed by many others: the plaintiff having first shown an enjoyment in fact.(c) It is said that the now plaintiff is claiming a private right, and that reputation is admissible only in respect of public rights: but the principle on which the evidence was admitted in *Weeks* v. *Sparke* applies here; namely that the right, though in some sense private, is public as respects the number of persons who are affected by it, and the notoriety which may thence be presumed. That case appears to overrule the opinion of the majority of the judges in *Morewood* v. *Wood*.(d) But, further, the evidence was given here in support of a right perfectly public, the common pur cause de vicinage between the two commons: the plaintiff's private right, as commoner, was a step in his proof altogether distinct, and did not, in itself, require the evidence in question, which was adduced only in support of the other step in the proof. The case much resembles that of a modus. Reputation cannot be given in evidence in support of a farm modus; but a district modus may be proved by reputation; *Rudd* v. *Wright*;(e) and then the particular farm may be shown, by independent evidence, to be within the district. It was suggested, when this rule was obtained, that formerly a commoner could not have given evidence in support of this right of common. The only objection, however,
*597] would have been from interest; *and that shows the publicity of the right, and is a circumstance in favour of admitting the evidence of reputation.

As to the motion, on the fifth and sixth pleas in bar; for judgment non obstante veredicto(g) or arrest of judgment: the pleas set out the right as in *Heath* v. *Elliott*, 4 New Ca. 388. But it is urged that, though the common pur cause de vicinage be rightly described, being laid as immemorial (*Tyrringham's Case*, 4 Rep. 36 *b*, 38 *a*), yet the pleas

(a) This point was abandoned by the counsel for the defendants, on the argument in banc, and does not require further mention.

(b) December 8th. Before Lord DENMAN, C. J., PATTESON, WILLIAMS and COLERIDGE, Js. COLERIDGE, J., left the Court during the argument.

(c) See *Crease* v. *Barrett*, 1 Cro. M. & R. 919, S. C. 5 Tyr. 458; and *Regina* v. *Lady H. B. M. Sutton*, 8 A. & E. 516, 523, note (c).

(d) Note (a) to *Doe, Lessee of Didsbury*, v. *Thomas*, 14 East, 327.

(e) Before Lord LYNDHURST, in the Court of Exchequer in Equity, 11th July, 1832; 1 Phil. Ev. 240. (9th ed.)

(g) See post, p. 602, note (b).

fail because they do not give the plaintiff an immemorial right, but rights of thirty and sixty years only. That, however, is unimportant. The immemorial right is necessary only so far as regards the two commons: but, that being shown, the right of an individual to partake in the general right need not be immemorial. The common pur cause de vicinage may be presumed to originate in the agreement between the lords of the adjacent wastes: such agreement would extend to all cattle lawfully in either common by whatever right. The common pur cause de vicinage is an excuse for trespass by any one entitled to put sheep on either common. It arises from neither party being bound to put up a fence: and, even where there is such a liability in either, it will not revive if it has once ceased to exist; *Boyle* v. *Tamlyn*, 6 B. & C. 329; where BAYLEY, J., treated the liability as an easement to the adjoining land.(*a*) It is true that no more sheep may be put on either common than it will support; *Corbet's Case*, 7 Rep. 5 *a;* which answers the suggestion, made in moving for this rule, that the right as claimed would give *a power [*598 to either commoner to the extent of any number of cattle. Nor is there any inconsistency even in assuming that the plaintiff had an immemorial right of common on Llanddausaint. Stat. 2 & 3 W. 4, c. 71, permits a more limited right to be pleaded and proved, where formerly an immemorial right must have been shown: but such a right, when established, does not exclude the supposition of an immemorial right. *Wakefeild's Case*, Owen, 4, cited when the rule was obtained, shows only that common from time immemorial cannot exist in respect of a house recently built. No such right is here claimed: the common pur cause de vicinage is immemorial for all commoners: all that can be called recent is the plaintiff's becoming a commoner, which is like the recent purchase of an immemorial tenement.

(They then argued as to the weight of evidence.(*a*))

Chilton and *E. V. Williams*, contrà. The right in question was private, and therefore could not be supported by evidence of reputation. MAULE, J., received the evidence on the authority of *Weeks* v. *Sparke*, 1 M. & S. 679, but expressed doubt. And it may be questioned whether that case was decided with sufficient consideration. The judgments of the Court appear to have proceeded on the ground that, although the right of tillage upon the common, there claimed, was not in itself a public right, yet inasmuch as it modified a prescriptive right of common enjoyed by a number of persons, it came within the rule of proof applicable to *public [*599 rights. If the decision is correct, a prescriptive right of common claimed by several persons must be deemed a public right of which reputation would be evidence: but, if so, a verdict obtained by one such commoner would be evidence in an action by another; and a further

(*a*) Pp. 338, 9.

(*b*) *Gullett* v. *Lopes*, 13 East, 348, was referred to, as to the separation which is sufficient to put an end to common pur cause de vicinage.

consequence would be that, before stat. 6 & 7 Vict. c. 85, one claimant of common appendant would have been incompetent, by reason of interest, to give evidence for another party claiming common appendant in the same place; which is directly contrary to the law laid down in *Harvey* v. *Collison*, 1 Selw. N. P. 426, 10th ed.(*a*) That objection does not appear to have been noticed in *Weeks* v. *Sparke*, 1 M. & S. 679. The Court there seem to have considered "general" as synonymous with "public." LE BLANC, J., said "a right of common is to a certain degree a public right." But the prescription there claimed was only a right of each individual to pasture in common with the lord. [PATTESON, J. The right to abridge the enjoyment of common concerned all the commoners.] The question at issue regarded only the private interest of each. If the multitude of persons individually interested will make a claim public, at what number will multitude commence? The distinction acted upon in *Rex* v. *Antrobus*, 2 A. & E. 788, 794, between private and public interests, must apply here. BAYLEY, J., says, in *Weeks* v. *Sparke*, that "reputation seems to be admissible" "in cases of prescription, which must have originated beyond the time of legal memory, and of which it is impossible to establish the claim by evidence of the grant." That remark cannot apply to a privilege *claimed only in respect of a sixty and a thirty years' enjoyment.

*600]

Nor, secondly, is the privilege itself claimable on the ground of a sixty or thirty years' enjoyment of the common from which the escape is made. It results from the authorities, so far as they afford any guidance, that common pur cause de vicinage must have existed from time immemorial, and must be claimed by an immemorial commoner. Common appendant, of which common pur cause de vicinage appears to be an incident, must have been granted at least before the statute of Quia Emptores (1 stat. 18 Ed. 1); it may now be claimed in pleading by virtue of enjoyment for sixty or thirty years; and the adverse party is not permitted to contest it on the ground that it had a modern origin anterior to one of those periods: but it would be hard if, on that account, such enjoyment of common could be made the foundation of another privilege which by its nature should be immemorial. [PATTESON, J. The claim pur cause de vicinage depends only on the cattle being lawfully in the place they escape from: it is immaterial to you whether they were there by immemorial right or not. WILLIAMS, J. Stat. 2 & 3 W. 4, c. 71, s. 1, affects the evidence of the right, but does not modify the right itself.] The proposition, that common pur cause de vicinage must have existed from time immemorial, is expressly laid down in *Tyrringham's Case*, 4 Rep. 38 (dictum of WRAY, C. J.), cited in Com. Dig. tit. *Common* (E). And in *Wakefeild's Case*, Owen, 4, it was held that a man cannot prescribe for common in respect of a house built within the

(*a*) Norfolk Sum. Ass. 1727. MSS., Serjt. Leeds.

last thirty years; the same point is stated in 4 Vin. Abr. *592, tit. *Common* (M), pl. 11.(*a*) So, common pur cause de vicinage, [*601 to be immemorial, must have been enjoyed in respect of some tenement to which it was immemorially attached. [PATTESON, J. Suppose two lords had agreed, time out of mind, that certain rights of common should be enjoyed mutually by tenants on the two manors, but there were at the time no commoners: would not the right accrue to tenants who came in afterwards? If there were an immemorial custom that the inhabitants of A. should have a path to the church, the custom would apply to new houses, and would not the less be immemorial.] *Wakefeild's Case* seems to limit that proposition. [PATTESON, J. The right there seems to have been claimed in respect of the particular messuage.] A mere right of common on one land cannot be sufficient to sustain the right of going upon another. The claim, as here set up, goes beyond excuse, and amounts to the assertion of a substantive right. Common of shack, as claimed in *Corbet's Case*, 7 Rep. 5 *a*, was, in its nature, a right existing always during a particular period: the case, therefore, is not analogous to this; here no right is claimed, but only an excuse when cattle happen to stray and the owners are not aware of it. If a right of common could of itself confer the privilege pur cause de vicinage, a lord, by multiplying grants of land to which common was appendant, might increase the number of tenants entitled to common pur cause de vicinage without any limit, and the neighbouring landowner would be without remedy, though, if the original common were *surcharged, [*602 the commoners might have redress against the lord or each other. [PATTESON, J. I never understood that common pur cause de vicinage was enjoyed in respect of one tenement in a manor and not of others. I apprehend it is general.]

It appears from *Heath* v. *Elliott*, 4 New Ca. 388, to be questionable at least whether common pur cause de vicinage can be claimed unless the pasture on each side is subject to right of common, and the claim is made by one against another of several commoners interested in the two commons respectively. The supposed privilege is pleaded here in the same form as in that case, which form appears also in 3 Chitt. Plead. 380, 7th ed. Whether or not it furnishes a proper description of common pur cause de vicinage appears doubtful, and was not decided in *Heath* v. *Elliott*. [PATTESON, J., asked if there were any instance of judgment non obstante veredicto for a defendant in replevin; observing that he was not aware of any objection to it in principle.(*b*)]

(The argument on other points of the case is omitted.)

Cur. adv. vult.

(*a*) Citing *Costard and Wingfield's Case*, 2 Leon, 44, which appears to the same with *Wakefeild's Case*, Owen, 4.

(*b*) *E. V. Williams*, to whom the question was put, said that he had not looked into the point, having only that day received his brief. He mentioned *Gwynne* v. *Burnell*, 6 New Ca. 453. See *Regina* v. *Governors of Darlington School*, 6 Q. B. 682, 703, 704, 718.

Lord DENMAN, C. J., now delivered the judgment of the Court.

The principal question in this case was, whether common of vicinage from time immemorial could be claimed by a person who states himself to be a commoner, not by prescription, but for thirty years, under stat. 2 & 3 W. 4, c. 71.

*603] *Now common of vicinage is not a right: it is but matter of excuse for a trespass. Co. Litt. 122 a, *Tyrringham's Case*, 4 Rep. 38 *b*, *Anonymous* case in 3 Dyer, 316 *b*, *Corbet's Case*, 7 Rep. 5 *a*, *Wells* v. *Pearcy*, 1 New Ca. 556, *Gullett* v. *Lopes*, 13 East, 348, *Heath* v. *Elliott*, 4 New Ca. 388, and other authorities, sufficiently establish this position. It may be claimed by prescription, but is rather matter of immemorial custom, as we have already stated in the case of *Jones* v. *Robin*, antè, p. 581, 588. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that is necessary, therefore, for the pleading to show is that the cattle were lawfully on their own common before they strayed; and that is done by showing thirty years' user under the statute. Before that statute, doubtless, it must have been shown that they were there either using a prescriptive or customary right of common, or by leave of the lord: but since the statute it is otherwise. It is said that great inconvenience may follow; that the lord of one manor may make many grants, and purposely overstock his own common in order to eat up the grass of the adjoining one by cattle that will stray. If that were really done, it might probably be held fraudulent; or, at all events, there is a remedy by inclosure.

As to the verdict being against evidence, we think that it was plainly a question for the jury, and that there is no such preponderance as warrants us in disturbing their verdict. As to misdirection, we see none. There is no complaint that the learned Judge put anything wrongly to

*604] the jury, but only that he did not *enter into all the details of the case. We think that it was for him to determine as to the necessity of so doing, and have no doubt that he exercised a sound discretion.

With respect to evidence of reputation, we are clearly of opinion that this case is within the authority of *Weeks* v. *Sparke*, 1 M. & S. 679, and that there is no objection on that ground.

The rule must be discharged. Rule discharged.(*a*)

(*a*) See the next two cases.

CLARKE, HIRST, J. HINCHLIFFE, G. HINCHLIFFE, and FARRAR, *v.* JAMES TINKER.(*a*) [*Nov.* 14, 1845.]

To establish a common pur cause de vicinage, an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed.

Semble, that a plea is bad, after verdict, which professes to show a common pur cause de vicinage, by usage, between the "close" of an individual and a waste or common.

Admitted, that, where there is a common pur cause de vicinage between two wastes, and one of them is, under a private act of parliament, conveyed to allottees for the purpose of being inclosed, and the commissioners under the act extinguish all rights of common on such one waste, these proceedings do not, of themselves, put an end to the common pur cause de vicinage.

THIS cause came on for trial before Lord DENMAN, C. J., at the Yorkshire Summer Assizes, 1842, when a verdict was taken for the plaintiffs on the general issue, and for the defendants on the special pleas hereinafter mentioned, with liberty to move to enter a verdict for the plaintiffs on those pleas; and contingent damages were assessed for the plaintiffs at 40*s*. In the ensuing Michaelmas term, this Court granted a rule nisi to enter a verdict for the plaintiffs accordingly, or to enter *judgment for the plaintiffs for the same damages non obstante veredicto. On the cause being subsequently called on for argument upon that rule, the Court directed a special case: and the case was accordingly stated, substantially as follows. [*605

The action was trespass. The declaration complained that defendant broke and entered certain closes of plaintiffs, called Dean Head Clough, Dean Head Moss, and Good Greave, in the Graveship of Holme in Yorkshire, and trod down the grass, &c., and also with cattle, namely sheep, ate up and depastured the grass and herbage.

Pleas. 1. Not guilty. Issue thereon.

2. That the said closes had, from time whereof, &c., lain and been contiguous and open to each other, and also to a large common or waste called Clowly Booth; and that they had never, during that time, been separated from each other, or from the said common or waste, by any inclosure, hedge or fence sufficient to prevent cattle depasturing in that common or waste from erring or escaping into them: that cattle, duly put on the said common to use the common of pasture therein, have, from time whereof, &c., gone, escaped and rambled, and have been used and accustomed to go, escape, &c., therefrom into the said closes in which, &c., and to intermix there and feed with cattle feeding therein; and, in like manner, the cattle, duly put into the said closes in which, &c., to feed there, have, from time whereof, &c., gone, escaped and rambled, and been used and accustomed to go, &c., therefrom into the said common, and to intermix there and feed with the cattle feeding there

(*a*) See the two preceding cases, and the next case.

and using the common of pasture therein. That Joseph Tinker was seised, and in the actual occupation, of eight beast-gates over the said *606] common, the said *beast-gates being common in gross and not common appendant or common appurtenant, and being thus particularly described, that is to say: common of pasture throughout the said common at all times of the year at his free will and pleasure, for cattle, sheep and lambs, to whomsoever belonging, but so as there should not be at one and the same time, using the said right of common of the said Joseph Tinker, more than eight head of cattle in the absence of sheep, ewes or lambs, or more than eighty sheep, ewes or lambs altogether in the absence of any cattle, nor more than in the above proportion, that is to say, more than seven head of cattle and than ten sheep, ewes and lambs altogether instead of each head of cattle less than eight, at the same time depasturing on the said common. That defendant, by and with the authority and consent of Joseph Tinker, put his, defendant's, sheep in the declaration mentioned into the said common or waste to depasture the grass there, and to use Joseph Tinker's common of pasture there: that the whole number of the defendant's said sheep, together with other sheep of Joseph Tinker then put into the said common, did not exceed eighty; and there were no cattle put there to use the said right of common of Joseph Tinker. That the said sheep of defendant remained there using the said common of pasture until they, of their own accord, and without the knowledge or consent of defendant, went, escaped and rambled from the said common or waste into the said closes in which, &c., and intermixed and fed with the cattle there, until defendant reclaimed and drove away the same: and defendant, as soon as he had notice of their having escaped, entered into the said closes to reclaim them: which are the several trespasses, &c.

*607] Replication. That the said cattle put on the said *common have not, from time whereof, &c., gone, escaped and rambled, nor have been used and accustomed to go, escape, &c., into the said closes in which, &c., and to intermix and feed with cattle feeding there; and that the cattle put into the said closes in which, &c., have not, from time whereof, &c., gone, escaped and rambled, nor been used and accustomed to go, &c., therefrom into the said common, and to intermix there and feed with cattle feeding and using the said common of pasture: and that Joseph Tinker was not seised, &c., of such common of pasture in gross over and throughout the said common or waste as alleged. Conclusion to the country. Issue thereon.

3. Plea. That the said closes and the said common or waste had been open, as in the second plea; that cattle, duly put on the said common to feed there and to use the common of pasture therein, from time whereof, &c., have gone, escaped and rambled, and have been used and accustomed to go, escape and ramble, therefrom into the said closes in which, &c., and to intermix there and feed with cattle feeding there; and, in

like manner, the cattle, duly put into the said closes to feed there, have, from time whereof, &c., gone, &c., and been used, &c., to go, &c., therefrom into the said common, and to intermix there and feed with cattle feeding there and using the said common of pasture there. That the said common or waste was the close, soil and freehold of one Sir Joseph Radcliffe, Baronet, and Daniel Ledgard, John Carter and Jonas Hobson, Esquires; and that the said sheep of defendant, in the declaration mentioned, had been put upon the said common or waste to feed there by the leave and license of the said Sir J. R. to defendant first given; and that they remained there, using the said common of pasture, until *they escaped, &c.: the remainder of this plea being the same as the second plea. [*608

Replication, denying the prescription as in the replication to the second plea, and also denying the soil and freehold and leave and license. Conclusion to the country. Issue thereon.

There was also a new assignment, on which defendant, relinquishing part of his plea of Not guilty, paid money into Court, which plaintiffs accepted.

The lands mentioned in the declaration adjoin each other, and are situate within the graveship of Holme, which graveship is within the manor of Wakefield in the West Riding of Yorkshire. On 9th May, 1828, an act was passed(*a*) for inclosing lands within that graveship; whereby commissioners were appointed for dividing and allotting certain commons, waste lands and moors or heaths, open common fields and undivided inclosures, within the graveship, and for otherwise carrying the act into execution. The case then set forth a notice, published on 12th July, 1828, signed by the commissioners, of a meeting to be held by them on 7th July then next, with adjournments, &c., when persons claiming common or other rights to or in the lands to be inclosed were to deliver particulars thereof, as specified in the notice. The case also set forth another notice, similarly signed, and published on 18th April, 1829, "that all rights of common and other rights whatsoever, in, over or upon any part of the commons, waste lands, moors or heaths, within the said graveship of Holme, belonging to or claimed by *any person or persons whomsoever, shall, from the day of the date hereof, cease, determine and be for ever extinguished." [*609

The lands, &c., mentioned in these advertisements, include those of the plaintiff, which, prior to the inclosure act, formed part of the commons or waste of the manor of Wakefield. On 9th and 10th December, 1833, the commissioners, under the power of sale in that act, by indentures of lease and release, duly conveyed the land in the declaration mentioned to the plaintiffs and two others in fee: and the whole interest

(*a*) 9 G. 4, c. 10, private: "for inclosing lands within the Graveship of Holme, in the several parishes of Kirkburton and Aldmonbury in the West Riding of the county of York."

of the two others, in 1837, vested in the plaintiffs. The award under the act was made on 12th April, 1834.

On 7th June, 1841, the plaintiffs gave the defendant a notice, of which the following is a copy. "We," &c., (naming the plaintiffs), "do hereby give you notice that we are the owners and occupiers of certain moor lands or grounds, commonly known by the name of the Home Clough and Wessenden Head Moors, situate and being in the graveship," &c., "in the West Riding," &c., and particularly described in the graveship of Holme inclosure award and plan belonging thereto, lodged in," &c. "And we do hereby give you further notice not to hunt," &c., "or otherwise trespass, on the said moor lands or any part thereof," "nor to permit or suffer your sheep or other cattle to pass or repass upon or across the said lands or grounds, or any part thereof. And, in case you disregard this notice, and you or your servants," &c., "or your sheep or other cattle, shall be found upon the said lands or grounds, or any part thereof, we shall deem you a wilful trespasser, and proceedings will be forthwith taken against you for recovery of such penalties and damages

*610] as you may be *liable to; and your sheep and other cattle, so trespassing, will be distrained." Signed by the plaintiffs. They had also given him several verbal notices not to trespass. But he and his sheep had been seen on the plaintiffs' lands several times afterwards.

Clowley Booth, in the pleadings mentioned, is in the manor of Marsden. The manors of Wakefield and Marsden adjoin each other. The closes mentioned in the declaration are contiguous to each other. Clowley Booth runs to the extremity of the manor of Marsden, towards the manor of Wakefield. Neither before nor since the inclosure act had there been any fence or inclosure separating the two manors, or separating the plaintiffs' closes, or any of them from Clowley Booth, or from each other. As far as living memory goes, it has been the practice to depasture sheep on Clowley Booth, and also on the commons or waste of the manor of Wakefield, including the closes in the declaration. And, during all that time, the sheep so depastured have from time to time strayed from one manor and waste to the other, and from the closes in the declaration to Clowley Booth, and from Clowley Booth to the closes in the declaration. But on many days in the year no straying took place. The owners or shepherds of the sheep which had so strayed, as well as the owners of the closes into which the sheep so strayed, or their shepherds, made a regular practice of turning them back to the place whence they had strayed. One of the witnesses said: "We were reckoned to take care of our sheep every day." The witnesses said that they had not heard of any body setting up a right to let their sheep go from one manor to the other to feed there.

*611] *Upon evidence of these facts being given, and the plaintiffs not disputing those parts of the second and third pleas which

alleged the title of Joseph Tinker to such common of pasture in gross in, across, over and throughout the said common or waste as in the second plea, and the soil and freehold and leave and license as in the third plea, his Lordship thought the residue of the issues on those pleas proved, and directed a verdict on those issues to be entered for the defendant, with liberty to the plaintiffs to move as above.

The questions for the opinion of the Court were: whether the verdict was to stand, or a verdict to be entered for the plaintiffs, on one or both of the special pleas; or whether, if the verdict was to stand, the plaintiffs were entitled to judgment non obstante veredicto on one or both of those pleas.

Cowling, for the plaintiffs. It was intended to argue, on behalf of the plaintiffs, that the common pur cause de vicinage was put an end to by the proceedings under the local act: but this point is abandoned, as the contrary is decided in *Wells* v. *Pearcy*, 1 New. Ca. 556.

The verdict on the issues upon the replications to the second and third pleas must be found for the plaintiffs. It does not appear that the sheep have intermixed, in the sense in which the plea must be read, that is, that they have intercommoned: the contrary appears. The pleas are not supported by the mere proof that the sheep have rambled; and they are disproved by the fact that the owners of the land on which they rambled have always driven them off, thus treating the *rambling as a trespass. In Co. Litt. 122 a, it is said that common pur [*612 cause de vicinage differs from common appendant and common appurtenant, "for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity; in which case one may inclose against the other, though it hath been so used time out of mind, for that it is but an excuse for trespass." And Blackstone, 2 Comm. 33, defines the right as follows. "Common, because of vicinage, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass." So in Termes de la Ley, 140, tit. *Common*, (ed. 1708): "Common pur cause de vicinage est, lou les tenants de deux seigniors sont seisies de deux seigniories dont l'un gist pres l'auter; et chescun de eux ont use de temps dont memorie ne courre de aver common en auter ville ovesque touts beasts commonable. Mes l'un ne poit mitter ses avers en le terre l'auter, car la ceux de l'auter ville poient eux distraine damage feasant, ou aver action de

trespasse: mes ils eux mittera en lour camps demesne, et si ils estray
*613] en les camps del auter *ville, ils doient eux sufferer." In Wood's Institute, 193, 10th ed. (B. 2, ch. 2), it is said: "Common, by reason of vicinage (because of neighbourhood) is a sort of common appendant, and is where the tenants of two lords (which are seised of two towns lying next to one another) have used time out of mind, to have common promiscuously and proportionably to their extent of common on both sides for all manner of beasts commonable. No man can put his beasts therein; but they must escape of themselves from one field to another, by reason of the neighbourhood. And this the law suffers, to prevent suits in open countries. Now this sort of common, being but an excuse for trespass, one town or manor, where the wastes of two lords lie together, may inclose against the other." The result is that there must be an intercommoning, originating in mutual consent. In an *Anonymous* case in 1 Dyer, 47 *b*, pl. 13, the common pur cause de vicinage is referred entirely to the intercommoning. That doctrine may also be collected from *Heath* v. *Elliott*.(*a*) In *Jones* v. *Robin*, antè, p. 587, 8, this Court appears to have assumed the necessity of express or tacit assent. So, conversely, common, when it exists, is often limited by the mutual assent of the commoners: thus heafing is a common practice in the north; it takes place where commoners, by agreement, mark
*614] *out, though without fencing, the several portions which each shall use: and this agreement, though not strictly binding, often continues for many generations. A fair test, as to the evidence here, is to inquire whether, if the allegation of the cattle intermixing, which has not been proved, had been omitted from the pleas, they would have been good. Now such an allegation, or one equivalent, appears in all the precedents. In Rastell's Entries, 625 *b*, pl. 11, there is an allegation of intercommoning, but none of rambling.

Next, the second and third pleas are bad, after verdict, because they attempt to set up a common pur cause de vicinage between common and land not common, the close of an individual. This Court, in *Jones* v. *Robin*, has decided that no such common pur cause de vicinage can exist: and, though error has been brought on that judgment, it must for the present be adhered to. Further, common pur cause de vicinage is a common appendant; 4 Vin. Abr. 587, tit. *Common* (K), pl. 5, 6; the claim ought therefore to be for cattle levant and couchant on the commoner's own land; Com. Dig. *Common* (E); and so is the precedent already cited from Rastell's Entries, *Trespass*, 625 *b*, 11, and that in

(*a*) 4 New Ca. 388. *Cowling* referred also the report of S. C. in 7 Law J., N. S., Com. P. 211, where LITTLEDALE, J., is reported to have said, at Nisi prius: "Is not common pur cause de vicinage an excuse for the trespass? and does not the driving back operate to prevent the acquiring of a right which would otherwise be the case?" "I am disposed to think, that if people have immemorially driven the sheep back, it tends to show that there never was a right of intermixing admitted to exist in former times; and, of course, it prevents any right from attaching in modern times."

Winch's Entries, 1085, 6. Here it is claimed in respect of common in gross, in the second plea. The third plea is still more objectionable: for it is clear that the owner of the soil of a common cannot, by permitting a stranger to put his cattle thereon, give him a common pur cause de vicinage in the close of another party.

Atherton, contrà. First, the intermixing and intercommoning were sufficiently proved. This being a *special case, and not a special verdict, the Court will draw all reasonable inferences of fact from what is stated. The cattle appear to have rambled from one district to another, from time immemorial: they must have depastured promiscuously. This fact is not met by the circumstance that the owners, in the several districts, were in the habit of driving off the cattle which had strayed. The foundation of the common pur cause de vicinage is not a contract, but arises from the excuse allowed by the law in order to avoid multiplicity of suits. In *Heath* v. *Elliott*, 4 New Ca. 388,(*a*) LITTLEDALE, J., seems to have considered the turning back of the cattle not to be absolutely decisive against the claim of common pur cause de vicinage. In *Bromfeild* v. *Kirber*, 11 Mod. 72, HOLT, C. J., said that a man ought not to keep his cattle in the common of vicinage; it follows that the other party may drive them off, though there be such common: the result is only that no action of trespass will lie for the straying: but the right does not entitle each party absolutely to depasture the common of the other. The evidence therefore is consistent with the two pleas. [*615

As to the motion for judgment non obstante veredicto, the decision in *Jones* v. *Robin*, antè, pp. 587, 8, certainly appears adverse to the defendant. But there the plea alleged that each of the contiguous districts was a farm; which the Court interpreted to mean land held in severalty. Here the pleadings show closes on one side and a common or waste on the other, upon which there were rights of common. Nor is it to be assumed, especially after verdict, that "close" means land held in severalty. A close may exist, though not separated *from adjoining land by other than an ideal boundary; 3 Bl. Comm. 299. Even a waste would be truly described as the lord's close: the plaintiffs here, consistently with the declaration, might be lords of a manor, and their closes might be portions of the waste of such manor. After verdict, pleadings will be so interpreted as to support the purpose for which they are introduced; as appears from *Fletcher* v. *Pogson*, 3 B. & C. 192; *Hobson* v. *Middleton*, 6 B. & C. 295; and *France* v. *White*, 1 M. & G. 731; in the last of which cases TINDAL, C. J., and MAULE, J., intimated that, where the pleadings could be so interpreted, the party objecting should be left to his writ of error. As to the form of the plea, the precedents are few and not uniform. It is true that, in Winch's Entries, 1085, 1086, the pleadings allege contiguous wastes. [*616

(*a*) See antè, p. 613, note (*b*).

But in *Heath* v. *Elliott*, 4 New Ca. 388, TINDAL, C. J., said that a "common" was a mere word of description: it would apply to an inclosed space in which there were no rights of common. In the entry in Winch the right of common is not alleged as mutual. In the entry in Rastell, 625 *b*, intercommoning is alleged, which perhaps imports mutuality; but there is no more express averment of mutuality; and the precedent is bad, inasmuch as it avers that the defendants placed (posuerunt) their cattle in the locus in quo. In *Heath* v. *Elliott*, the decision was only that, where a party has exclusive possession, the mere want of a fence does not subject the land to be depastured by cattle from a common adjacent. It is objected that the second plea sets up a common in gross as the foundation for common pur cause de vicinage: but no principle can be suggested for excluding common in gross.

*617] *Cowling*, in reply. As to the evidence: if the argument on the other side be correct, any crossing of cattle from the border of two contiguous districts would establish a common pur cause de vicinage. *Bromfeild* v. *Kirber*, 11 Mod. 72, shows merely that, where there is common pur cause de vicinage, the owner of cattle may follow them on the common to which they have strayed, for the purpose of driving them back, without being a trespasser.

It is said, in answer to the motion for judgment non obstante veredicto, that the Court will interpret the word "close," if necessary, as part of a common or waste. The same argument might have been urged in *Jones* v. *Robin*, antè, p. 581: part of a waste may be let to "farm." In that case the successful party had pleaded over. *Jackson* v. *Pesked*, 1 M. & S. 234, shows that, even after verdict, words will not be so interpreted as to have a wider meaning assigned them than is requisite to support a proof of the allegation on which issue is joined.

Lord DENMAN, C. J. The ground on which I considered this to be a proper question for the consideration of the Court was that Lord Coke and Blackstone do not define the common pur cause de vicinage in the same way. Lord Coke seems to consider that it is enough that two commons be open one to the other,(*a*) so that cattle must escape: whereas

*618] Blackstone says, 2 Comm. 33, *that it is where the inhabitants "have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either;" and he calls it a "permissive right." But in *Jones* v. *Robin* this Court entered fully into the consideration of the principle: and, though we do not find it expressly so said in Coke, it is clear that the real principle is mutual acquiescence, and that there must be, not only an absence of fence, but an immemorial allowance of the straying

(*a*) See Co. Lit. 122, *a*, and *Tyrringham's Case*, 4 Rep. 38 *b*, where WRAY, C. J., ascribes such common to the "ancient usage which the law allows to avoid suits which would arise, if actions should be brought for every such trespass, when no separation or inclosure is between the commons."

of the cattle. We must, in this Court, abide by the decision of *Jones* v. *Robin*, which was a well considered case. I think it difficult to distinguish the present case from that by means of Mr. *Atherton's* ingenious suggestion for the construction of the verdict: for it seems to me that we cannot assume "close" to mean waste or common. But the question is whether the second and third pleas were proved at all. For, even if I was right in entertaining a doubt whether an absence of fences would not be of itself sufficient to create the common where the sheep were permitted to ramble in fact, we have not such a fact here: we have only the fact that the sheep did escape and ramble, which proves nothing as to the view which the parties took of the right. The pleas state an intermixing and feeding, as well as a rambling and straying. The plaintiffs are entitled to say that the statement is not proved, unless we had proof, either from the time for which the sheep were allowed to remain, or from the evidence of some one who knew the fact, that they fed without molestation.

*WILLIAMS, J. The proof of the issues joined on the second and third pleas lay upon the defendant. Now, when we turn to the evidence, we find it stated that sheep which strayed were turned back, either by their shepherds or by the owners of the land on which they had strayed; that this was a continual practice, and reckoned to take place every day. The evidence, therefore, completely negatives that which is the foundation of the defendant's case, namely, constant undisturbed going of the sheep from one district to the other. [*619

WIGHTMAN, J.(*a*) The defendant must prove, not merely that the sheep rambled from one district to the other, but that they intermixed, or, as it has been expressed, that they intercommoned; that is, that the two districts were used as one common. And, to show this, it must appear that, when the sheep were mixed together in this way, that was acquiesced in. That, as it seems to me, is, not only not proved, but expressly negatived. ' For we find, as a regular practice, that the sheep were driven back by their own shepherds into their own land, and were driven off the other land by the owners of such other land. The former may perhaps not prove anything; but the latter is conclusive against the pleas. The verdict on the second and third pleas must therefore be entered for the plaintiffs. We need not decide the other point: though I am strongly disposed to think that Mr. *Atherton* has not succeeded in distinguishing this case from *Jones* v. *Robin*, and that the second and third pleas are not very good.

Verdict to be entered for plaintiffs.(*b*)

(*a*) COLERIDGE, J., was absent, owing to indisposition.
(*b*) See the next case.

*620] *In the Exchequer Chamber.

(Error from the Queen's Bench.)

JONES v. ROBIN. *May* 13.

Semble, by the Court of Exchequer Chamber, that common pur cause de vicinage may exist between two neighbouring proprietors, though there be no other right of common over the lands, on either side, from which the cattle escape.

Held, by the same Court (affirming the judgment of the Queen's Bench), that a plea, claiming common pur cause de vicinage in respect of a private estate over which no other right of common is shown, and alleging such common to exist by custom, is bad. And that a plea of such common, against the owner of the land into which the cattle escape, must be a plea of grant or prescription.

And, therefore, that a claim of such common, merely alleging that the land of A. and the land of B. were, and from time whereof, &c., had been contiguous to each other, and not separated by any fence, and that the sheep from time to time duly put on the land of A. to feed "from time immemorial have gone, escaped," &c., "and have been used and accustomed to go," &c., therefrom into the land of B., "and to intermix there and to feed with sheep from time to time feeding on" B.'s land; and in like manner, &c.; alleging in similar form that the sheep duly put on B.'s land have gone therefrom and been used, &c., upon the land of A., and to intermix, &c.; is ill pleaded: the objection being taken to the replication, on demurrer to the rejoinder.

ERROR was brought in the Exchequer Chamber on the judgment in this case (antè, p. 581), the special causes assigned being, that the replication is sufficient, and the rejoinder insufficient; that common pur cause de vicinage may exist between two closes held in severalty, and is well shown and pleaded in the replication to have existed between the said farms called Tan y Graig and Nant Heilyn; and it was therefore not lawful for the defendant to distrain the plaintiff's sheep as confessed by him to have been done in his pleas; that the replication is not answered by the rejoinder; and that the rejoinder is double, multifarious and contrary to precedent. Joinder in error.

The writ of error was argued in Michaelmas vacation, 1846.(*a*)

Watson, for the plaintiff in error (plaintiff below). The rejoinder is not

*621] supported: the question turns wholly *on the sufficiency of the replication. There are few precedents; the form which in all material respects has been followed here is that of a plea of common pur cause de vicinage in 3 Chitty on Pleading, 380, 7th ed. The Court of Queen's Bench was not warranted in laying down that common of this kind cannot be claimed between persons holding lands as private owners. Common pur cause de vicinage, according to Co. Litt. 122 a, differs from common appendant or appurtenant in this, "that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity: in which case one may inclose against the other, though it hath been so used time out of mind, for that it is but an excuse for trespass." The same law is stated in *Tyrringham's*

(*a*) December 2d. Before COLTMAN, MAULE and CRESSWELL, Js., and PARKE, ALDERSON, ROLFE and PLATT, Bs.

Case, 4 Rep. 36 *b*, 38 *a*, *b*, and in Com. Dig. *Common* (E), where it is said that such common is in the nature of a common appendant, though it be not so, and therefore it ought to be claimed from time whereof, &c. [ALDERSON, B. What do you say is the immemorial grant implied by this usage ?] It is impossible, where there are no fences (as on a mountain side, where in fact the sheep were feeding in the present case), to prevent straying; and, no action having ever been brought, an agreement may be inferred to tolerate, on each side, that which necessity excused. This right, as it is defined by the authorities, need not be limited to wastes of manors, where various parties have rights of common. In Fitz. Nat. B. 180 D, after stating that "None shall claim common by vicinage but the lord who hath the possession of the town, 23 H. 6,"(*a*) it is added: "But *yet it seemeth, that one neighbour may claim common by vicinage in the land of another neighbour, although he be not lord of the town, &c. And so if a man claim common in certain lands so long as he dwelleth in such a town to such a house, or if he claim common in the land until the lands be sowed, and after the corn is cut, to have common there again." If the party has land on which the cattle were feeding when they escaped, he must, on making excuse, show his ownership of such land; if they escaped from land on which he had right of common, he must allege that right; as, in pleading that sheep escaped out of a highway for defect of fences, it must be shown that they were lawfully in the highway; *Dovaston* v. *Payne*, 2 H. Bl. 527. The Court of Queen's Bench said, in *Prichard* v. *Powell*, antè, p. 603: "The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that is necessary, therefore, for the pleading to show is that the cattle were lawfully on their own common before they strayed." That the excuse does not depend on the land into which cattle stray being legally waste, appears from *Wells* v. *Pearcy*, 1 New Ca. 556. There lands on which common pur cause de vicinage had existed were comprehended in a private inclosure act, which empowered a commissioner to direct that all rights of common over such lands should cease; and he did so; yet, the lands not having been actually inclosed, it was held that the feeding of sheep there was still excusable under the former right by reason of vicinage. It would have been the same if the lords of the adjacent lands respectively had bought up all the rights of common; the privilege of excuse pur cause *de vicinage would not have been abolished. Therefore common pur cause de vicinage may exist where there is no right of common in the adjacent lands. This appears also from the precedent, in Rast. Ent. *Trespas*, 625 *b*, 11, of a plea that the lord and tenants at will for the time being of a manor, and the lord of another manor (under

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(*a*) It is also laid down in Fitz. Abr. *Comen*, pl. 5, that no lord shall claim, &c. (as above), with a reference to 22 H. 6, 51 Yearb. Pasch. 22 H. 6, 51 A, pl. 15).

whom the defendant held at will) and those whose estate he had, &c., and their tenants at will, &c., used to intercommon casuâ vicinagii in certain contiguous *pastures*, being parcels of the two manors respectively. [MAULE, J. There the common is pleaded as prescriptive. Here it is not pleaded as prescriptive, nor yet, strictly, as by custom.] It cannot be claimed by prescription; for it is not a right in alieno solo, either of a profit à prendre or of an easement, but rests in mere excuse. As POWELL, J., said in *Bromfeild* v. *Kirber*, 11 Mod. 72: "This sort of common must be in nature of an escape, and so an excuse; for a man cannot put in his cattle in the common of vicinage originally but they must escape. They may inclose one against the other, if they will be at the charge:" and HOLT, C. J., observed: "In pleading this kind of common, it ought to be pleaded mutual. If a man go into a common of vicinage to drive his cattle off into his own common (for he ought not to keep them in the common of vicinage), he may justify this trespass; but if they go into a third common, such excuse perhaps will not hold." In *Smith* v. *Baynard*, 3 Keb. 388,(*a*) (not cited in the Court below,) it was pleaded, in bar to an avowry for taking cattle damage feasant, "that the locus in quo adjoins to the common, to which the plaintiff's ground adjoined," and that the cattle of the defendant" (plaintiff) "put into his *grounds have used time out of, &c., to escape, &c., and that he put in the cattle and they escaped into the defendant's ground for want of inclosure by A. and the plaintiff" (defendant): and, on demurrer, the Court said: "this is vicinage sufficient, as well as to say that he and all those seised of those lands have common rations vicinagii." The observation of HOLT, C. J., in *Bromfeild* v. *Kirber*, points to mutuality as the ground on which rights of this kind rest; which is consistent with their being claimed prescriptively by individuals. In *Wells* v. *Pearcy*, 1 New Ca. 563, 567, and *Heath* v. *Elliott*, 4 New Ca. 388, 391, reciprocity of advantage was insisted upon as essential; and in *Clarke* v. *Tinker*, antè, p. 618, mutual acquiescence was pointed out as the real principle on which this practice must rest. In Yearb. Hil. 13 H. 7, 13 B, pl. 3 (cited in 4 Vin. Abr. 587, tit. *Common* (K), pl. 6), it was held that "common pur cause de vicinage does not begin only by the bare prescription, but with the prescription, and the consideration that the other shall have common in like manner in his land;" and in this respect it was distinguished from common appendant. This agrees with the doctrine of Lord COKE in *Corbet's Case*, 7 Rep. 5 a, where he says that in Norfolk "there is a special manor" (manner) "of common, called Shack, which is to be taken in arable land, after harvest until the land be sowed again, &c., and it began in ancient time in this manner: the fields of arable land in this country consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to

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(*a*) See pp. 638—640, post.

the others, can feed their cattle in their own land; and therefore every *one doth put in their cattle to feed promiscuè in the open field." [*625 And he then adds: "the said common, called Shack, which in the beginning was but in the nature of a feeding because of vicinage for avoiding of suit, within some places of that country, is by custom altered into the nature of a common appendant or appurtenant, and in some places it retains its original nature; and the rule to know it is the custom and usage of every several town or place:" and he further states, as a criterion, that, if a party has purchased, and long since inclosed, divers parcels of land in which the inhabitants have used to have shack, and, notwithstanding, the inhabitants have had shack there by passing in at bars or gates with their cattle, there it shall be taken to be common appendant or appurtenant, and the owner cannot exclude them, though he will not common with them: "but if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed their own lands from time to time, and so hath held it in severalty, there this usage proves, that it was but in the nature of shack originally for the cause of vicinage, and so it continues; and therefore there he may inclose and hold in severalty, and exclude himself to have shack with the others." He then states a resolution of the Court that if commons of the towns A. and B. adjoin, and one has common with the other by reason of vicinage, and in A. there are fifty acres of common, and in B. a hundred, A. cannot put more cattle into their common of fifty acres than it will feed without respect to the common in B., nor è converso: "for the original cause of this common for cause of vicinage was not for profit, but for preventing of suits in a champaign country; for the reciprocal escapes of the one town into *the other." These authorities show that [*626 the claim to common pur cause de vicinage depends, not upon the number of persons occupying the lands out of which the cattle come, or the nature of their interest, as commoners or exclusive proprietors, but upon reciprocity of advantage between proprietors of any description, by the mutual allowance of escapes which are unavoidable, and which are kept within due limits. The right of common of shack was discussed in *Cheeseman* v. *Hardham*, 1 B. & Ald. 706; but the case does not bear upon this; and the privilege does not, as there stated, originate in a right of each individual to put on the common such a number of cattle as his own land is capable of supporting: its foundation is necessity, from want of inclosure, and vicinity. The marginal note in *Heath* v. *Elliott*, 4 New Ca. 388,(*a*) is not borne out by the report: the essential point was that the sheep had not in fact been allowed to stray from one down to the other. And so, in *Clarke* v. *Tinker*, antè, p. 604, there had not, in point of fact, been any intercommoning. The Court below was mistaken in assuming that the claim here was pleaded as by custom. The replication sets up neither custom nor prescription, but merely states that the closes

(*a*) See p. 613, note (*b*), antè.

have lain open to each other without any obligation to fence, and that cattle have escaped reciprocally, thus resting the case upon a mutuality of excuse which has prevailed from time immemorial.

G. Hayes, contrà. The replication is insufficient. It does not state
*627] that the depasturing by plaintiff's sheep *was "as of right;" nor is there any equivalent allegation. It has been usual to allege common on the respective closes from which the cattle strayed, and to state that cattle feeding on such common were used to stray on the adjoining waste. The excuse here is unreasonable: it is claimed in respect of sheep feeding on neighbouring farms: but one farm may contain five acres, another five hundred: one may consist chiefly of arable land, the other of pasture. Nothing is stated which limits the number of the sheep. The replication here is framed partly on the plea of common of vicinage and partly on that of escape by defect of fences; the allegation that the plaintiff had no notice of the escape is borrowed from the latter, and is immaterial to the former plea. No case has been cited in which one, at least, of the adjacent closes was not subject to right of common. If land is not waste, a man is bound to keep his cattle from straying upon it, and has no right to expect that his neighbour, unless bound by prescription, should fence to keep them out; this appears from *Churchill* v. *Evans*, 1 Taunt. 529, and Com. Dig. *Droit* (M 2). Common pur cause de vicinage is described in Com. Dig. *Common* (E) as existing when two or more "towns have common" in the fields within their towns, which are open to the fields of the neighbouring towns, and the cattle, "put to use their common there," escape, &c.: and *Tyrringham's Case*, 4 Rep. 38 *b*, is cited, where WRAY, C. J., said that the excuse was admitted "by reason of the ancient usage which the law allows to avoid suits which would arise, if actions should be brought for every such trespass, when no separation or inclosure is between the
*628] commons." [PARKE, B. That reason applies to other lands *than commons, where many sheep are kept.] Such lands may be inclosed, to prevent straying. In *Corbet's Case*, 7 Rep. 5 *b*, common pur cause de vicinage is treated of incidentally, and the case is put where "the commons" of two towns are adjoining, and in the town of A. there are fifty acres of common, and in the town of B. a hundred. Where common of shack exists, each portion of land is used in the same way: the same remark applies to common on wastes; and there the limitation on the common itself limits the right of common pur cause de vicinage. The reason for the practice, assigned in *Corbet's Case*, 7 Rep. 5 *a*, that the fields "consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to the others, can feed their cattle in their own land; and therefore every one doth put in their cattle to feed promiscuè in the open field," applies to a number of persons, but not to two. [ALDERSON, B. It would apply to two, if one

bought many pieces of land interspersed with the other's land.] In *Bromfeild* v. *Kirber*, 11 Mod. 73, HOLT, C. J., treats of common of vicinage with reference only to cattle fed on commons. In *Gullett* v. *Lopes*, 13 East, 348, the question related to commons properly so called. *Cheesman* v. *Hardham*, 1 B. & Ald. 706, is so far an authority here, as the reasoning of BAYLEY, J., seems applied to rights of pasture enjoyed by many persons. In *Wells* v. *Pearcy*, 1 New Ca. 566, 567, TINDAL, C. J., adopts the language of the authorities which refer the privilege of common by reason of vicinage to rights of pasture on neighbouring *commons; and the excuse relied upon in that case arose out of such a right. [MAULE, J. You say that there must be rights of pasture in a number of persons. How many will make up a number?] [*629 At least there is no instance in which common by reason of vicinage has been claimed between two only. The precedent in 3 Chitt. Plead., 380, 7th ed., speaks of the privilege as enjoyed in respect of contiguous closes, not commons; but no authority is given for such a form. In *Heath* v. *Elliott*, 4 New Ca. 391, it was suggested that the plea did not unambiguously show a right of common on Houghton Down; but the decision turned on the application of the evidence to the pleadings; and TINDAL, C. J., thought it rightly found by the jury that on Houghton Down there had been no permitted use of pasture at all. [PARKE, B. The case goes far to show that common pur cause de vicinage might have existed where one only of the pastures from which the cattle escaped was subject to common. The ordinary right of common was alleged there as existing on one of the downs, but was not alleged as to the other. According to you the plea was bad.] It was not demurred to. [MAULE, J. You would find it difficult to show a plea of this kind where any right of common is alleged except that on which the party pleading relies in his own excuse.] LITTLEDALE, J., on the trial of *Heath* v. *Elliott*, appears to have thought the evidence not conclusive against common pur cause de vicinage on either down; for that the driving back of the sheep from each was consistent with the claim, that resting merely on excuse. [ALDERSON, B. They could not be driven back if there was *common by reason of vicinage. The fact of such driving was evidence against the claim.] [*630 If the claim exists, the trespass, though excused, is not to continue. [ALDERSON, B. The party wishing to get rid of it must inclose. *Clarke* v. *Tinker*, antè, p. 604, shows that driving back is evidence against the claim. PARKE, B. In Termes de la Rey, 140, tit. *Common*, ed. 1708, it is said that, where there is common by reason of vicinage, if cattle of one town stray into fields of the other, "there they ought to suffer them."] In that passage it seems to be considered that the whole object of the practice is "good neighbourhood" between towns. HOLT, C. J., said, in *Bromfeild* v. *Kirber*, that, if a man's cattle stray, "he ought not to keep them in the common of vicinage." Blackstone, 2 Comm. 34, speaking of this kind

of common, says: "Neither hath any person of one town a right to put his beasts originally into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass." In *Smith* v. *Baynard*, 3 Keb. 388, the pleadings are not fully stated; and the case is obscure and contradictory. If, then, there be no precedent for claiming this privilege except where there are adjacent commons, the plaintiff cannot justify a pleading which, in effect, alleges a right to let his cattle stray on a neighbour's pasture unless he incloses, and does not expressly found that right on a prescription.

Watson, in reply. Supposing the argument for the defendant to be correct, there is no authority for saying that a party relying on common by reason of vicinage must necessarily plead that both the adjacent pas-
*631] tures, *of which he holds one, were commonable. [COLTMAN, J. Have you found any case where the party claiming the excuse did not aver that the land from which his own cattle escaped was common?] That was not exactly the form of averment in *Clarke* v. *Tinker*. The assumption that common of this kind has been recognised only where the neighbouring proprietors were many, because the purpose was to prevent multiplicity of suits, has no real foundation. A thousand sheep of one proprietor may cause as much litigation as if the proprietors were a thousand. In the passages which have been cited as to neighbouring towns, the word "town" does not necessarily imply the existence of common of pasture. They probably refer to the case, not unusual, of open lands in which certain persons of a township have a freehold or other common interest. [COLTMAN, J. Where there was common of pasture, the number of cattle would necessarily be limited: but, in the case of an exclusive interest, what would be the limit?] It would be the proprietor's duty not to overstock. [CRESSWELL, J. In the exercise of right as on a man's own land, who can say what is overstocking?] The argument drawn from this inconvenience was considered and met by the Court of Queen's Bench, in *Prichard* v. *Powell*, antè, p. 603. There is a plea of common of shack in *Whiteman* v. *King*, 2 H. Bl. 4, where the enjoyment of that right by the landowners mutually is set forth as an essential part of it. In Bracton, 222 b, B. 4, c. 38, § 1, common by reason of vicinage is grounded wholly on neighbourhood and mutuality: "Item" (acquiritur communia) "ex causâ
*632] vicinitatis, ut si quis cum vicino, et *vicinus cum eo." The same words appear in Fleta, 254, B. 4, c. 19, § 3.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.

This case was argued at the sittings after last Michaelmas term, before my brothers ALDERSON, COLTMAN, MAULE, ROLFE, CRESSWELL, PLATT, and myself. It came before us on a Writ of Error on a judgment of the Court of Queen's Bench for the defendant, on a demurrer to a rejoinder. (His Lordship here stated the pleadings.) The rejoinder

was admitted on the argument here, as it was in the Court of Queen's Bench, to be bad; and the question is whether the replication was good.

It must be considered to be established that a common, or as it is sometimes called feeding, *Corbet's Case*, 7 Rep. 5 *a*, per cause de vicinage, is not properly a right of common or profit à prendre, but rather an excuse for a trespass; Co. Lit. 122 a: see also the authorities cited in *Wells* v. *Pearcy*, 1 New Ca. 556, 567. Lord Coke says that the person entitled cannot put in his cattle into the adjoining waste, but they must escape into it; yet in some of the precedents after noticed, as in Rastell, 625 b, and Year Book, 22 H. 6, p. 51,(*a*) the turning on is stated to be on the adjoining pasture. It must, however, we think, be considered that the law is as stated by Lord Coke. The question then arises, to which the argument before us was mainly addressed, whether it is essential, to support such a claim, that it should be between persons having rights of common properly so called, or at least that there should be commoners on both sides, *or whether it may [*633 exist between two proprietors whose lands are not subject to common rights: and very ingenious arguments in support of the affirmative of that proposition were used. The Court of Queen's Bench do not appear to have expressed any distinct opinion on this point.

If this had been the only question, we think, after a careful consideration of the arguments and of the authorities, we should probably have held that it might exist between two proprietors without commoners on either side. The reason of the law which sanctions a claim of this sort is either on account of its convenience, it being better to intercommon than that each should watch his own cattle, 7 Ed. 4, 26;(*b*) or to avoid multiplicity of suits, 4 Rep. 38 b:(*c*) and both these reasons apply to owners who interpasture as well as to commoners, though, as to the latter, not to the same degree: and the argument that the right can exist amongst commoners only, because they only are limited in turning on cattle on the undivided waste or land, is of no weight, because the alleged usage restricts the right of intercommoning to cattle *duly* turned on in order to pasture on the land of one proprietor, and therefore limits the number to such as could reasonably be fed on the land in respect of which the right is claimed. See also *Corbet's Case*, 7 Rep. 5 *a*. And, if we refer to the authorities, we find that none lay it down to be necessary that there should be rights of common on both sides; and there are several old authorities that the right may be prescribed for by two owners. In the *Year Book, 22 H. 6, p. 51,(*d*) is a prescription [*634 by the lord of Sale for his freeholders for life, for years or at will, without any allegation that they had right of common. In Fitz. Nat. Brev. 180 D, it is said, "one neighbour may claim common by

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(*d*) Yearb. Pasch. 22 H. 6, f. 51 A, pl. 15.

vicinage in the land of another neighbour, although he be not lord of the town." In the Year Book 7 Ed. 4, 26,(*a*) there is a difference of opinion between the judges. COKE, C. J., was of opinion that the allegation of a custom for the inhabitants of Sale to intercommon was bad, and that the prescription should be in a que estate; and LITTLETON, J., contrà, that it was enough to plead usage. The necessity of a right of common in the persons pleading the usage is not mentioned. In the case of common of shack, *the owners* of common field lands, not the commoners, intercommon; *Corbet's Case*, 7 Rep. 5 *a*. Of modern precedents not many are to be found. That in Mr. Chitty's book,(*b*) from which this replication appears to have been taken, does not mention rights of common. It is followed in the case of *Clarke* v. *Tinker*, in part, right of common being stated on one side, not on the other. That in *Heath* v. *Elliott*, 4 New Ca. 388, states the usage to be both for cattle turned on to feed and to use common of pasture. In *Wells* v. *Pearcy*, 1 New Ca. 556, the usage is said to be for commoners only. In one precedent of the late Mr. Serjeant Williams it is pleaded as a right by custom for cattle depasturing and feeding, not stating in what right; in another, an ancient usage *for common pur cause, &c., for all having either right of pasturage or common of pasture. On the whole, the authorities appear to show that there is no necessity for commoners on both sides in order to give validity to a claim of common pur cause de vicinage, though, where such common exists, most frequently there are commoners on both sides.

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But, even assuming it to be clearly made out that two private owners of estates may have the right of interpasturing, we do not think that such right is properly claimed by this replication.

The Court of Queen's Bench held that such a claim in a private estate could not be good by *custom:* and we entirely agree with them. A custom is the lex loci, an ancient local law in some known district, as a hamlet, town or manor; Co. Lit. 110 b; and does not arise from the grant, act or agreement of the party; *Gateward's Case*, 6 Rep. 59 *b*, 60 *b:* whereas, this right does, and, though not a profit à prendre, nor properly an easement, but rather an excuse for a trespass, has its origin from a presumed mutual grant or covenant between the owners of each farm that neither of them or their tenants should sue the other or his tenants, or distrain, or perhaps even drive their cattle away (see Termes de la Ley,(*c*) *Common per Cause*, &c.), so long as the farms should respectively lie open to each other. It is releasable like any other private right; and it ought, according to the rules of pleading, to be pleaded as a prescription. A prescriptive obligation on another, such as to repair fences, need not be pleaded in a que estate, because the party pleading

(*a*) Yearb. Hil. 7 Ed. 4, f. 26 A, pl. 3.
(*b*) See 3 Chitt. Plead. 380, 7th ed.
(*c*) 140, Ed. 1708.

does not know the *title, and may therefore say that the tenants and occupiers, from time whereof, &c., have been used to make [*636 and repair fences; but the real nature of the right in question is not a simple prescriptive obligation not to sue for trespasses or distrain cattle on his side, but a mutual obligation on both. The obligation of one owner is the consideration for that of another: per HOLT, C. J., "it ought to be pleaded mutual;" *Broomfeild* v. *Kirber*, 11 Mod. 73: and therefore we think that so general a mode of pleading as has been adopted in this case, which seems to have been taken in part from a plea of the obligation to repair fences, cannot be sustained. There ought, upon principle, to be a plea of prescription in a que estate where it is not a manorial custom; such a plea is given in Rastell's Entries, 625 *b*; though, it is to be observed, in that precedent the turning on is alleged to be on the adjoining common, which is inconsistent with the notion of common pur cause de vicinage as generally received.

The present replication appears to us to be defective in substance as a plea of prescription. It does not state that the farms have respectively time out of mind had common pur cause de vicinage, eo nomine, or in any way show the common to be annexed to the estate in the land which the plaintiff occupies. The statement, in the subsequent part of the replication, of the plaintiff's title to the land forms no part of the statement of right or quasi right, but only serves to bring the plaintiff's sheep within the right as before claimed; it only states by way of showing the common pur cause de vicinage, that the sheep have from time, &c., been used *and accustomed to wander. This fact, indeed every part [*637 of the replication, may be true, and yet Nant Heilyn and Tan y Graig may have been both the property of one owner in fee till the commencement of the suit.

In pronouncing this decision we are not called upon to say what allegation of common pur cause de vicinage would be sufficient in a declaration or in any pleading in which the common was not claimed against the opposite party, but against some other by way of inducement; or in any case wherein the party pleading is a stranger to the right of common; or where his position is such that, by the rules of pleading, possession only (or, in case of things incorporeal, quasi possession) is sufficient to maintain his pleading: nor do we decide what is the proper form of claiming common pur cause de vicinage in the more usual case in which it is claimed as incident to an ordinary right of common on the land from which the cattle escaped. These cases are to be governed by the principles of law and the authorities which are applicable to them. Our decision is confined to the case of a party who is shown by the preceding part of the record to be a wrongdoer on the land of the opposing party, claiming by his replication, &c., the common pur cause de vicinage as annexed or incident to his own land, in derogation of the general exclusive right of his opponent to his land. In such a case the general prin-

ciples of law require that the claim should be shown to arise by grant or prescription; and we think the replication, in the present case, defective in substance for not showing the one or the other.

*638] On the argument, the case of *Smith* v. *Baynard*, *which was cited from 3 Keble, 388, 417, was pressed on the Court as one in which a plea to the like effect as this replication had been held good on demurrer. The report referred to is so confused (even after correcting some obvious mistakes of "plaintiff" and "defendant" for each other) that it is scarcely possible to conjecture from it what was the matter in question, or to draw from it any inference except that the pleadings and argument are erroneously and imperfectly stated. There is a notice of the case in a later stage in the same book, p. 417, not referred to in the argument, which is much clearer, and which reports that case as one in which the plaintiff in his replication replied to a justification for damage feasant that his cattle escaped from a close in which he had common pur cause de vicinage into the defendant's close in default of repair by the defendant, who was bound by prescription to repair; to which the defendant demurred: and the plaintiff had judgment. This is sufficiently simple and intelligible; but, as it seemed unlikely that in this state of the record the confusion in the report, p. 388, should have arisen, or some of the questions obscurely intimated there have been raised, we caused the record, which is still extant in the Queen's Bench, to be examined. It is of Hilary term 25 & 26 C. 2, 112. By this record it appears that it was an action of replevin for taking the plaintiff's cattle in Cross Park. The defendant in his avowry said that Cross Park contains one acre, and that he is seised in fee, and took the cattle damage feasant. The plaintiff pleaded in bar that he is owner and seised of twenty acres, called Vicarage Common, contiguous to a parcel

*639] *of land called Tregowe Common, not separated by any fence, &c., from Vicarage Common, and that, from time whereof, &c., the aforesaid cattle were accustomed to feed in the twenty acres and to stray into Tregowe Common, and to intercommon on account of vicinage; and that Tregowe Common was contiguous to a close of John Paul called Havas and Creeg; and that John Paul and the tenants of that close, &c., from time whereof, &c., were accustomed to repair the fences between that close and Tregowe Common; and that Havas and Creeg lies contiguous to a close of the defendant called Croft, and that the defendant and tenants of Croft, and John Paul and the aforesaid tenants and occupiers of Havas and Creeg, were used and ought to repair the hedges and ditches between Havas and Creeg and Croft, and that Croft lies contiguous to Cross Park in which, &c., then in the occupation of the defendant: and the plaintiff further said that, he being seised of Vicarage Common and the defendant seised of Cross Park, he put his cattle into the twenty acres to feed there; and, because the hedges of the defendant between the two closes were broken in defect of defendant, that, the

plaintiff having placed his cattle to feed there, they strayed into Tregowe Common and from thence into Havas and Creeg, and thence into Croft, and thence to Cross Park, into which they entered in default of the defendant, and the cattle were in the said close in which, &c., feeding, at the same time when, &c., until the defendant took them, &c. The defendant demurred to this plea in bar, stating, as special causes, that by the law of the land, cattle of any one person cannot obtain any right of intercommoning in alieno solo by usage or "per aliquam longi temporis prescriptionem," and for that it is not shown by *that plea [*640 that the cattle entered by defect of fences. The plaintiff joined in demurrer. No judgment is entered on the roll. But, supposing the judgment to have been for the plaintiff, as reported in 3 Keb. 417, it by no means supports the replication in the present case. The plea in bar in *Smith* v. *Baynard*, 3 Keb. 388, 417, does not claim right of common pur cause de vicinage in the defendant's land, but amounts only to a plea of defect of fences, the averments preceding the statement of escape through defect of fences into the defendant's land having no other purpose than to show that the plaintiff's cattle were lawfully on the land adjoining the defendant's, and thus that the alleged trespass arose from a default of the defendant without any default of the plaintiff: see Fitz. N. B. 128 C, 9th ed., note (*a*), where it is said that, "If A. be bound to inclose against B. and B. against C., and beasts escape out of the land of C. into the land of B. and thence into the land of A., A. shall not have trespass against C."

The allegation, in the plea in bar in *Smith* v. *Baynard*, of common pur cause de vicinage in Tregowe Common, not charging the defendant's land, but being introduced only for the purpose above mentioned, was properly considered as sufficient, on the same principle that possession of a close without showing title would in a like case have been. It appears, therefore, that the case of *Smith* v. *Baynard* does not support the replication in the present case.

For the reasons before given we think that replication insufficient, and that the judgment must be affirmed. Judgment affirmed.

*The SAINT KATHARINE Dock Company *v.* HIGGS. [*641

Within a district under the jurisdiction of Commissioners of Sewers, were three (among other) levels, S., W. and N. Each was separately assessed for its own drainage. Afterwards, the S. and W. levels were united by certain works into one level; and, some years after, the level formed by such union was united by new works with the N. level. The inhabitants of the N. level then derived benefit, in common with the rest of the inhabitants of the last united level, from the sewers of the whole last united level, but they were not benefited, and were prejudiced, by the union, their own sewers, which previously were sufficient to drain the N. level, being now, for the purposes of the whole last united level, more used than before.

By a jury at a Court of Sewers for the district under the jurisdiction of the Commissioners, plaintiffs, who were occupiers of land in the N. level, were presented as owners and occupiers

of taxable property within the district. The Commissioners of Sewers confirmed this presentment, and laid a single rate on the united S., W. and N. level.

Held, by the Court of Queen's Bench, and by the Exchequer Chamber, affirming the judgment of the Queen's Bench:

1. That the Commissioners had power, at their discretion, to unite the levels.
2. That plaintiffs, deriving benefit from the sewerage of the level formed by such union, were liable to be assessed to the joint rate for the whole.

REPLEVIN. At the Middlesex sittings after Trinity term, 1843, before Lord DENMAN, C. J., a verdict was found for the plaintiffs, subject to a case, with liberty to turn the same into a special verdict. In Trinity term, 1845, the case was argued(*a*) by *Dundas* for the plaintiffs, and *Kelly* for the defendant. The pleadings, the statements in the case, and the arguments used, will appear sufficiently from the judgment of this Court, and the proceedings in the Exchequer Chamber.

Cur. adv. vult.

PATTESON, J., in the same term (June 4th, 1845), delivered the judgment of the Court.

This was an action of replevin for taking certain goods and chattels of the plaintiffs. The defendant made cognisance under the authority of the Commissioners of Sewers for the Tower Hamlets, and acknowledged the taking for a tax assessed by the said *commissioners, acting under a commission bearing date the 5th December, 1837. To this there was a plea in bar, that the defendant of his own wrong took the said goods and chattels.

*642]

And the question is, whether the said tax so assessed be or be not legal, no objection having been raised in the course of the argument to the nature and form of the defendant's authority.

It appears from the case that the jurisdiction of the Commissioners of Sewers for the Tower Hamlets extends over a large and very populous district containing several parishes drained by means of communications with the rivers Thames and Lea. Within that district is contained a portion of the works of the plaintiffs hereinafter mentioned. Previously to, and in, the year 1803, the said district comprised six distinct and separate levels, three of which only it is needful to specify, the Spital Fields level, the Wapping level, and the Nightingale Lane level. After that year, three other levels were added, not material to the present inquiry; as to which, however, it is stated that the addition was not arbitrarily made, but was suggested by the mode in which each of those levels could be drained by distinct outlets into the rivers Thames and Lea respectively. Until the junction of the Spital Fields and Wapping levels, and of that then united level with the Nightingale Lane level, as hereafter mentioned, each of the several levels had always been separately assessed for the expenses of its own drainage: and the Night-

(*a*) May 27th. Before PATTESON, WILLIAMS and COLERIDGE, Js. Lord DENMAN, C. J., was present during the early part of the argument for the plaintiffs.

ingale Lane level had never been jointly assessed with any other level until the assessment now in question.

In the year 1825, an act(*a*) passed, intituled "An *act for constructing certain wet docks, warehouses and other works, in the parish of St. Botolph without Aldgate, and in the parish or precinct of St. Katharine, near the Tower of London, in the county of Middlesex:" and the plaintiffs were constituted a company of proprietors of the docks, basons, &c., under the name and style of "The St. Katharine Dock Company." Shortly after the passing of this act, the docks, warehouses and other works of the said Company were completed, a portion of the said works being without and the rest within the jurisdiction of the Commissioners of Sewers of the Tower Hamlets. Nothing, however, turns upon this circumstance; because it is not the amount but (as already mentioned) the legality of the assessment which is disputed. [*643

In the year 1827, the then Commissioners of Sewers for the Tower Hamlets made the aforesaid junction between the Spital Fields and Wapping levels, and made them one by means of certain works, which it is not necessary to specify. And, by a decree of the 15th of November, 1836, the then Commissioners of Sewers (being different from those who made the assessment now in question) ordered that a communication should be made between the Spital Fields and Wapping level and the Nightingale Lane level by means of two distinct sewers in the case particularly described, joining the former with the latter level at two separate points, and effecting the drainage of the Spital Fields and Wapping level by means of the sewer of the Nightingale Lane level. The expense of this junction was paid by rates made exclusively upon the Spital Fields and Wapping level. It is also stated that the only available outlet for the necessary drainage of the Spital *Fields and Wapping level was through the sewer of the Nightingale Lane level. Upon the subject of the benefit derived by the Nightingale Lane level from this junction, the statements in the case are somewhat contradictory. It is true, there is the following passage: "The St. Katharine Dock Company have, ever since the said junction, in respect of their property derived benefit from the sewers of the said Spital Fields, Wapping and Nightingale Lane level, in common with the rest of the said level." That is, in a certain sense, true undoubtedly; because the Nightingale Lane level generally, and the plaintiffs amongst others, have their drainage continued by means of the original sewer; but it is difficult to perceive any additional benefit derived to them. And, accordingly, in another part of the case we find the following passage: "The said Nightingale Lane level derived no benefit whatever from the works by which the alleged junction was effected, or the junction itself, their own drainage having been amply sufficient for their own purposes: and, [*644

(*a*) 6 G. 4, c. cv., local and personal, public.

by the increased use of their sewers by the increased passage of water from the Spital Fields and Wapping level, their sewers are prejudiced."(*a*) It is observable, however, upon this part of the case, that it is nowhere stated that the owners and occupiers in the Nightingale Lane district have been more heavily taxed since the junction than when they were separately assessed.

*645] Under these circumstances, a jury of Sewers, holden *at a Court of Sewers for the limits in question,(*b*) on the 22d June, 1838, made a presentment, wherein, amongst other things, they found that the plaintiffs were the owners and occupiers of property liable to be taxed. Whereupon the Commissioners of Sewers, by a decree made on the 20th July, 1838 (as before mentioned), and headed "Spitalfields, Wapping and Nightingale Lane Level," confirmed the said presentment, and assessed the plaintiffs in the sum for which the levy was made, being at the rate of 9*d.* in the pound.

And now the first and most important question arises, whether the Commissioners of Sewers have the power of uniting levels which had always before been separate, and separately assessed. In the consideration of this question it is necessary to advert to the nature of the Commission of Sewers, and of the extent of the authority thereby conferred.

The jurisdiction of the Commissioners of Sewers must, from the nature of the thing, be extensive. By being intrusted with the drainage of a district (and a more important one than the district in question cannot easily be supposed) they have necessarily duties cast upon them, at all times of great trust, it may be of great urgency. For all existing and probable contingencies they are bound to provide; and that, too, in such manner as to their judgment may appear to be, upon the whole, most convenient. If the necessity of a district require a new sewer or sewers, we cannot see any reason to doubt but that the Commissioners of Sewers

*646] may give orders accordingly, as in the three *additional levels already noticed seems to have been done, and done without objection. By strict analogy, if the circumstances require it, the union of levels, before separate, is equally within their competence, as, in the instance of the Wapping and Spital Fields levels, such junction was made, and also, so far as appears, without objection. If, therefore, there be jurisdiction in the Commissioners, as we think there is and must be, all the circumstances of each case, and the degree of benefit to each of the members of a newly incorporated district, amongst the rest (upon the absence of which benefit in this instance so much reliance was placed in the argument), is a matter for their discretion only: and with that we cannot interfere: it rests with the Commissioners, who are judges of

(*a*) The case adds: "but the said junction is a benefit to the said Spital Fields and Wapping level: and, if the said Commissioners had power to make the said junction, the whole united district does derive a common benefit from the united system of sewers."

(*b*) The presentment was headed: "Presentment, Spitalfields, Wapping and Nightingale Lane level, 1838, Sewers, Middlesex, Tower Hamlets, We," &c.

all the circumstances, though we are not. If the operations of the Commissioners must, in each instance, be suspended until the precise effect upon each level intended to be united could be exactly ascertained, it is obvious that consequences the most serious might result from the delay.

But the case of *Rex* v. *Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517, was cited, and much relied upon, as showing the illegality of a joint assessment upon several levels, and the necessity of a separate assessment upon each. Upon adverting, however, to the circumstances of that case, it appears that, at the time when the joint rate was imposed, there existed six several and independent levels, which had always been severally assessed and never had been joined; nor was there any junction between the sewers themselves: they were, *therefore, as perfectly distinct for purposes of contribution as [*647 are parishes or townships in respect of maintenance of the poor, repair of roads, or other burthens in each of those districts. In the present instance, however, the Commissioners of Sewers of July, 1838, formed the Spital Fields, Wapping and Nightingale Lane level: and it was not suggested how otherwise, except upon the united district, any rate could have been imposed to provide for the continual and necessary expense of drainage. The other cases cited had less bearing upon the present. The case of *Soady* v. *Wilson*, 3 A. & E. 248, turned upon the degree and kind of benefit which a party must derive in order to make him liable to a sewer's rate. And the case(*a*) or cases cited from 3 Q. B. Reports only show that where is no occupier there can be no rate.

We have just adverted to the circumstance of the assessment being joint. It is certain that, in the course of the argument, it had occurred to the different members of the Court that, although the union of the levels might have become necessary, the former mode of contribution might have been continued, or, in other words, that the assessment should be in such form as to secure to the Nightingale Lane level its former contribution. We are satisfied, however, upon consideration, that, since the union has been effected, no assessment could be made upon the districts separately, or part upon one and part upon another, without being open to objection. And this furnishes a strong, if not in itself a sufficient, reason for sustaining the rate.

*Upon the whole, we are of opinion that our judgment must be [*648 for the defendant. Judgment for defendant.

The case was afterwards turned into a special verdict, the findings of which precisely followed the facts stated in the special case: and judgment was entered thereon, in the Court of Queen's Bench, for the defendant. Upon this judgment error was brought in the Exchequer Chamber.(*b*)

(*a*) *Tracey* v. *Taylor*, 3 Q. B. 966; *Neave* v. *Weather*, 3 Q. B. 984.

(*b* For a point of practice decided in this stage of the case, see the end of the present report, p. 652, note (*a*), post.

The case was argued in last Hilary vacation,(*a*) before WILDE, C. J., MAULE and WILLIAMS, Js., and PARKE and ROLFE, Bs.(*b*)

Sir *D. Dundas*, Solicitor General, for the plaintiffs in error (plaintiffs below). The Commissioners of Sewers have no power under stat. 23 H. 8, c. 5, 2 stat. 2 W. & M. c. 8, s. 14, and stat. 3 & 4 W. 4, c. 22, from which their authority is derived, to join together two distinct levels. It appears from section 14 of this last mentioned statute that the word "level" means a valley or district, and also that separate rates are to be made for each separate valley or district.(*c*) The junction was at all events illegal without previous notice to the separate levels.

The verdict finds that the Nightingale Lane level is not benefited, but that it is prejudiced by the junction; *and it is an established principle that benefit from a drainage is the criterion of rateability; *Rooke's Case*, 5 Rep. 99 *a*; *Keighley's Case*, 10 Rep. 139, *a*; *The case of the Isle of Ely*, 10 Rep. 141, *a*; *Anselm* v. *Barnard*, 2 Keb. 675; *Masters* v. *Scroggs*, 3 M. & S. 447; *Stafford* v. *Hamston*, 2 B. & B. 691; *Rex* v. *Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517; *Soady* v. *Wilson*, 3 A. & E. 248.(*d*) *Rex* v. *Commissioners of Sewers for the Tower Hamlets* shows also that the Commissioners must make separate rates for separate levels. *649]

Sir *F. Kelly*, contrà. It may be admitted that levels cannot be jointly rated so long as they are separate; but the question is whether separate levels cannot be joined together, and one joint rate made upon them after they are so joined. The Commissioners have, by the express provisions of the statutes already referred to, an absolute discretion as to the reformation, amendment and alteration of sewers; and no notice is requisite of their intention to join two separate levels.

It may also be admitted that there is no rateability where there is no benefit. But the verdict shows that the plaintiffs have benefit from the drainage in respect of which they are rated, for they are rated to the united drainage of the levels now in junction; and, although it is true that neither they nor the other occupiers in the Nightingale Lane level were benefited by the junction itself, yet they are now benefited by the drainage of the united level since the junction; and this is sufficient to support the assessment. *650]

Sir *D. Dundas*, Solicitor General, replied. *Cur. adv. vult.*

WILDE, C. J., in this vacation (May 12th), delivered the judgment of the Court.

In this case a writ of error was brought on a judgment of the Court of Queen's Bench, in an action of replevin to try the validity of a sewer's rate imposed on the plaintiffs in respect of a part of their pro-

(*a*) February 3d and 4th.

(*b* ALDERSON, B., was present during the argument for the plaintiffs in error, on the 3d February.

(*c*) He also referred to Dugdale's "History of Imbanking and Drayning," (London 1661). See p. 171, ch. 32. &c.

(*d*) *Netherton* v. *Ward*, 3 B. & Ald. 21, was also cited to this point in the Court below.

perty. The Court of Queen's Bench were of opinion that the rate was valid, upon the facts stated on a special verdict: and we are all agreed that the judgment of that Court shall be affirmed.

The special verdict states the facts at considerable length; but it is not necessary to advert to them in detail, the question which they ultimately raise for the consideration of the Court lying in a very narrow compass.

The Commissioners of Sewers for the Tower Hamlets, under whom the defendant justifies, act under a commission of the date of the 5th December, 1837, embracing a very extensive district, which has been divided into levels, that is, districts, included in one common rate as being benefited by the same system of drainage. These levels have not been always the same, but varied according to alterations in the system of drainage. Of these, Nightingale Lane level was one. The plaintiffs' dock was partly constructed within this level; and there was an outlet for the drainage of the level into the river Thames. The drainage of Spital *Fields and Wapping level, within the jurisdiction [*651
of the same Commissioners, requiring a fresh outlet into the river, the then Commissioners, in the year 1836, in the exércise of their discretion, made a decree to unite the drainage of that level with that of the Nightingale Lane level. They did so in the year 1837, at the expense of the level of Spital Fields and Wapping, by making sewers communicating with the main sewer of the Nightingale Lane level. After this, the sewers in the united level requiring repair, a presentment was duly made in 1838 by a jury; and the Commissioners made a rate in consequence upon the whole of the *united level*, assessing the plaintiffs in respect of their property. And the question is, whether that rate is valid.

The principal difficulty in the course of the argument arose on the construction of some parts of the special verdict: but, on an explanation given by the counsel concerned, that difficulty is removed; and we must now determine the case upon the assumption that the jury have found two facts: first, that the change made by the union of the sewers of the Spital Fields and Wapping level with those of the Nightingale Lane level was not beneficial to the latter, but the reverse; but, secondly, that, after the union, the plaintiffs have, in respect of their property rated, derived benefit from the sewers in the entire united level.

Upon this finding we are all satisfied that the rate was a valid rate. The Commissioners by their commission are to cause sewers to be amended and reformed, "as case shall require, after" their "wisdoms and discretions;"(*a*) but, when the amendments are made, they *have a power to tax those only who derive benefit from them, [*652
or who have or would have loss or disadvantage if they had not been made.

(*a*) Stat. 23 H. 8, c. 5, s. 3.

In the alteration made by the Commissioners, by connecting the drainage of one level with another, and thereby forming one united level, the Commissioners exercise their discretion: and a Court of law in which an action may happen to be brought for anything done in pursuance of the act which they have authorised has no power whatever to question or review the exercise of their discretion. It must be assumed to be correct in all respects; and the plaintiffs cannot be permitted to complain of it in the present action. But, on the other hand, inasmuch as the plaintiffs derived benefit from the sewers, after they were made, the repairs of which are to be paid by this rate, they are unquestionably liable to be rated for their property: and the rate, being made in due form, is without doubt valid. Judgment affirmed.(a)

(a) The following preliminary point was determined in this case.

[Exchequer Chamber. Monday, *February* 2, 1846.]

A writ of error does not abate by the death of the defendant in error after judgment signed and before assignment of errors, but may proceed as far as reversal or affirmance without introduction of the executors on the record. Consequently, if the plaintiff in error fail to assign errors in time, judgment of non-pros may be signed, though the executors have not previously been made parties.

After judgment had been given for the defendant in the Queen's Bench, the defendant Higgs died, June 12th, 1845. Judgment was entered up, July 26th as of June 4th, by a Judge's order. The special case having been turned into a special verdict, error was brought on the judgment, writ tested August 9th, 1845, returnable November 3d. The writ of error was allowed, October 11th. The judgment was transcribed, and the transcript money paid to the proper officer on November 4th; and thereupon the writ of error with the transcript annexed was delivered, on that day, to the proper officer of the Court of Error. On November 12th, the attorney for the plaintiffs was about to deliver his assignment of errors, when the defendant's attorney, on reading the draft, suggested that it was incorrect, inasmuch as it reqnired Higgs himself, and not his executor, to join. The plaintiffs' attorney, on consulting his own counsel, was advised that he could not alter the assignment of errors until the defendant's *attorney should have
*653] sued out a scire facias quare executionem non, to make Higgs's executor a party to the record. The sci. fa. was accordingly issued (teste, November 21st), and notice thereupon given by the sheriff to the St. Katharine Dock Company to appear in the Court of Queen's Bench on January 12th, 1846, the return day of the writ, to show cause why Charles Hammond, executor, &c., of Thomas Higgs, deceased, should not have execution against them for 388*l.*, costs and charges, according to the force, &c., of the judgment of recovery in the action of replevin. On December 12th, 1845, errors not having been assigned, non-pros against the plaintiffs was signed in the Exchequer Chamber in the original action of the *St. Katharine Dock Company* v. *Higgs*.

Ogle, in Hilary term (January 12th) 1846, moved in the Court of Queen's Bench for a rule to show cause why the scire facias and the judgment of non-pros should not be set aside, and proceedings on the sci. fa. and judgment, and on the original judgment in this court, stayed. He made this motion on the ground that the sci. fa. was irregular, because made returnable on a day certain; as to which he cited 2 Chit. Arch. Pract. 1025, Part III. ch. 3, sect. 2, (8th ed.): and because the proceedings were contrary to good faith. [Lord DENMAN, C. J., expressed doubt whether this Court could set aside a judgment of non-pros in the Exchequer Chamber.] That question might have arisen before stat. 11 G. 4 & 1 W. 4, c. 70; but, under that act, sect. 8, a transcript only of the record is returned into the Exchequer Chamber to the writ of error; the record is here, at any rate till error be assigned and issue joined, and may be dealt with by this Court. The Court of Exchequer Chamber would say they had no jurisdiction. [Lord DENMAN, C. J. At present I cannot feel that we are enitled to interfere with the judgment of the Court of Error. If you apply to them and they think they have no jurisdiction, we may reconsider the matter. In the meantime your object will be attained by our granting a rule to stay proceedings on the sci. fa. and original judgment, pending that application.]

The Court (Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.) granted a rule

to show cause why the sci. fa. should not be set aside, or why the proceedings thereon should not be stayed: and it was ordered that proceedings in the original action should be stayed in the mean time.

In the same term, *Dundas* obtained a rule in the Court of Exchequer Chamber, calling upon J. W. Unwin, gentleman, "the attorney for the late defendant in the Court below," to show cause why the judgment of non-pros signed by him upon the writ of error should not be set aside for irregularity and for having been signed against good faith, and why the plaintiffs in error should not have seven days time to assign error.

*Martin, with whom was *Willes*, now showed cause, before TINDAL, C. J., POLLOCK, C. B., MAULE, CRESSWELL, and ERLE, Js., PARKE and ROLFE, Bs. The old practice as to writs of error appears in note (l) to *Jaques* v. *Cesar*, 2 Wms. Saund. 100 *k*, et seq.; but the proceedings are now regulated by Reg. Gen. Hil. 4 W. 4, R. 10, 11, (5 B. & Ad. xv.) The latter rule provides that "no rule to allege diminution, nor rule to assign errors, nor scire facias quare executionem non, shall be necessary, in order to compel an assignment of errors; but, within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the Court of Error," "the plaintiff in error shall assign errors;" in failure of which "the defendant in error, his executors or administrators, shall be entitled to sign judgment of non-pros." The plaintiffs ought to have assigned errors in eight days from November 4th. The writ in the suit did not abate by the death of the defendant; nor were the plaintiffs authorised to wait the return of the scire facias quare executionem non: the object of that writ is, not to compel an assignment of errors, but that, if the plaintiff in error does not assign them, the party entitled may have execution. [TINDAL, C. J. We think your view is correct, subject to what the other side may say; but it is really only a question of costs. POLLOCK, C. B. The plaintiffs must be let in to argue the writ of error.] *Martin* was then stopped by the Court. [*654

Dundas and *Ogle*, contrà. It was the duty of the party upholding the judgment to suggest the death and put the executor on the record; till then, the plaintiffs did not feel warranted in assigning errors. [PARKE, B. There was no occasion to introduce the executor's name till some one wanted it. You should have assigned errors; if they had refused to join, you might then have proceeded by scire facias ad audiendum errores: but until such refusal you did not want the executor as party. TINDAL, C. J. If they had joined in error without introduction of the executor, the omission would have been of no consequence.] The judgment of non-pros, signed in the name of a dead man, is irregular. [ERLE, J. How does it appear on the record that he is dead?] If the record only be looked to, it does not appear that the assignment of errors is too late. [PARKE, B. The judgment of non-pros is the act of the Court; the parties do not interfere. If a judgment of affirmance had been given it would have been in the name of the dead man, as the judgment of non-pros here is. But it is said in 2 Tidd's Pract. 1163 (9th ed.), that "a writ of error does in no case abate by the death of the defendant in error, whether it happen before or after errors assigned: If it happen before, and the plaintiff will not assign errors, the executors or administrators of the defendant in error may have a *scire facias quare executionem non*, in order to compel him; or if it happen after, they must proceed as if the defendant in error were living, till judgment be affirmed, and then *revive by *scire facias*, but cannot take out execution pending the writ of error."] [*655

(The counsel for the plaintiffs in error also insisted that there had been bad faith; as to which no statement is necessary.)

TINDAL, C. J. If the rule is that a writ of error does not abate by the death of the defendant in error, it follows as a consequence that interlocutory judgment may be signed, as has been done in the present case: though the costs cannot be obtained without making the executor party to the record. Therefore this rule for setting aside the judgment of non-pros can be made absolute only on payment of costs.

The rest of the Court concurred.

Rule absolute for setting aside the judgment of non-pros on payment of costs by the plaintiffs in error to the attorney for the defendant. Assignment of errors to be delivered in a month.

In Easter term (May 8th) 1846, the Court of Queen's Bench, on affidavit of the above decision, made their rule of January 12th absolute to the extent "that execution be stayed till the judgment of the Exchequer Chamber in the above cause shall be pronounced."

END OF EASTER VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Trinity Term and Vacation,

X. & XI. VICTORIA.

The Judges who usually sat in Banc in this Term and Vacation were,

Lord DENMAN, C. J. — COLERIDGE, J.

PATTESON, J. — ERLE, J.

CHARLOTTE MUNDEN *v.* The Duke of BRUNSWICK.

To an action on an annuity deed, defendant pleaded that, at the time of making the deed, he was the reigning sovereign duke of Brunswick and Luneberg; that the deed was made by him within his dominions; and that, from the time of the making thereof until action brought, he had been, and still was, *justly entitled* to all the rights, prerogatives and privileges appertaining to him as the duke of Brunswick and Luneberg.

Held, on demurrer to the replication, that the plea was bad for not stating that defendant was reigning sovereign duke at the time when the action was brought or plea pleaded.

DEBT on an annuity deed of 2d February, 1829, by which the defendant granted to the plaintiff an annuity of 200*l.* for her life. The declaration claimed 200*l.* as the annuity due and unpaid in February, 1846.

*657] Plea. The defendant, in his own proper person, *comes and says that this Court ought not to take cognisance of this action, because he says that, at the time of making the said deed in the declaration mentioned, defendant was a sovereign prince; that is to say, the reigning sovereign duke of the duchy of Brunswick and Luneberg. That the said deed was made by him within his said dominions, that is to say, within the said duchy of Brunswick and Luneberg; and that from the time of the making thereof continually, and at the time of the commencement of this suit, defendant has been, and still is, justly entitled to all the rights, prerogatives and privileges appertaining to him as the duke of Brunswick and Luneberg. That, by reason of the premises, he ought not to be compelled against his will to answer to any action for the cause

aforesaid before any justice or minister of the Queen of this Kingdom, or other judge whomsoever, or any Court whatsoever: and this he is ready to verify, &c. Wherefore he prays judgment if the said Court here ought to take cognisance of this action.

Replication. Plaintiff says, that, by any reason of anything by defendant in his plea alleged, this Court ought not to be barred from taking cognisance of the aforesaid action of the plaintiff; because she says that the said contract was made by defendant, and the said debt accrued from defendant to plaintiff, not for, or in respect of, or concerning, any matter or thing appertaining to the said state, government or policy of the said duchy of Brunswick and Luneberg; but the said debt was, and is, a private debt owing from defendant in his private and personal capacity to plaintiff. That, after the making of the said deed, and before the accruing of the said debt, to wit, on 1st January, 1844, *defendant quitted the dominions and territory of the said duchy, and [*658 became, and at the time of the accruing of the said debt and the commencement of this suit was, and still is, resident and domiciled within the kingdom of England and the jurisdiction of this Court, not as a sovereign prince, but as a private individual; and became and was, and still is, under the protection of, and subject to, the laws and government of this realm, owing allegiance to our Sovereign Lady the Queen; and this the plaintiff is ready to verify. Wherefore she prays judgment that this Court may have and take cognisance of her aforesaid action against defendant, and that defendant may further answer thereto.

Demurrer, on the following grounds: That the replication does not traverse any matter alleged in the plea, nor any matter necessarily implied therein. That, if the allegation therein, that defendant is resident and domiciled within the kingdom of England and the jurisdiction of this Court, not as a sovereign prince but as a private individual, be intended as a denial of the averment, in the plea, that defendant is entitled to all the rights, prerogatives and privileges appertaining to him as the duke of Brunswick and Luneberg, it is an informal and argumentative denial thereof. That the replication is not sufficient by way of confession and avoidance, inasmuch as it admits that, at the time of making the deed, defendant was a sovereign prince; and it does not aver that the same was not made by him in that character, or that it was not a sovereign act and grant, or that the same was not made and granted by him in his sovereign character. That the averment, that the said contract was made by defendant, and the debt accrued from defendant to plaintiff, not for, or in respect *of, or concerning, any matter or [*659 thing appertaining to the state, government or policy of the said duchy of Brunswick and Luneberg, is ambiguous, uncertain and insufficient; and if by the word "contract" be intended the deed in the declaration mentioned, the plaintiff ought, according to the rules of

pleading, to have so designated it; and it is consistent with the whole of the said allegation, that the said deed was a sovereign act and grant; and the allegation, that the debt was and is a private debt, is a mere inference of law. Joinder in demurrer.

The demurrer was argued in last Easter term.(*a*)

Lush, for the defendant. A sovereign prince is not liable to be sued in this country for any act done by him in his own dominions; and it is admitted on the record that defendant executed this deed in Brunswick, and that he was then the sovereign of that state. Nor does the replication contain any traverse of the averment that the defendant is still entitled to the prerogatives of a sovereign prince; if it does, the traverse is argumentative and incomplete; for the statement, that the defendant is domiciled in England and subject to its laws, would be satisfied by proof that he was a visitor in this country. The case set up by the replication is, that the act, in respect of which the defendant is sued, was not an act of state, and that he is now an English subject. But the act in question is averred, in the plea, to have been done by the defendant while he was a sovereign prince; and it must be presumed that it was done by him in that character. This point was much discussed in *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1, 57, where Lord LANGDALE, in his judgment, says: "In respect of any act done out of this realm, or any act as to which it may be doubtful, whether it ought to be attributed to the character of sovereign or to the character of subject, it appears to me that it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject. And it further appears to me, that in a suit in this Court against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to show that the subject matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject. I cannot, therefore, consider the present suit as an ordinary suit between subject and subject; it is a suit against a defendant, who is primâ facie entitled to special immunities, and it ought to appear on the bill, that the case made by it is a case to which the special immunities ought not to be extended." There might have been some room for argument, if the replication had shown that the defendant could have been sued in his own country; *Melan* v. *The Duke de Fitzjames*, 1 B. & P. 138.

*660]

Bovill, contrà. The replication is framed upon the very passage cited from Lord LANGDALE'S judgment. The plea relies on the primâ facie immunity; and the replication answers it by introducing the exceptional facts which give jurisdiction to this Court, namely, that the defendant is an English subject, and that the act in question is not attributable to his character of sovereign. It was for the defendant to state that he was not liable to be sued on the deed in his own country,

(*a*) April 27th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

*if the fact be so: it appears that the deed was executed in Brunswick; but what the law of Brunswick is does not appear. [*661

Lush, in reply. The act in question was not done by the defendant as an English subject: he was not liable to the jurisdiction of English courts at the time of the contract; and no subsequent change of circumstances can render him liable. The judgment of Lord LANGDALE turns entirely on the point that the act in question before him had not been done by the King of Hanover as an English subject; and the character of the act in other respects was immaterial to the judgment. [PATTESON, J. In *Hill* v. *Bigge*, 3 Moore, P. C. C. 465, 467, a passage is cited from Pufendorf (*a*) "De officio hominis et civis," which bears on the present case: "If the subject be aggrieved by a sovereign, he cannot maintain an action or oblige him to redress: he may persuade him if he can."(*b*)

Cur. adv. vult.

Lord DENMAN, C. J., in this term (May 25th), delivered the judgment of the Court.

We think the defendant's plea is bad for not stating that he was a sovereign at the time of commencing the suit, or of plea pleaded. That he was a sovereign prince when he made the contract is an immaterial fact; that he is justly *entitled* to the privileges and *prerogatives belonging to that character, is merely his opinion of his rights, [*662 an opinion which he might hold, though he had formally abdicated his sovereignty, and most probably would hold if he had been an usurper, in the temporary occupation of royal power, justly driven by the legitimate ruler from the realm.

If, indeed, being sovereign prince de facto, he had, in that character, made such a contract with the plaintiff, and so had not bound himself as an individual, that might perhaps constitute a good defence to the action, not a good plea to the jurisdiction. But sovereign princes may contract obligations in their private capacity on considerations purely personal. Whether by the laws of their own country these might be there enforced, we have no means of knowing: there is no presumption either way. Neither is there any presumption that this contract is an act of state; the contrary would be more naturally inferred from the nature of it. Without an averment to that effect, the plea tells us nothing but that the defendant, when for good consideration he entered into a certain contract, was a sovereign prince. This is clearly insufficient.

Judgment for plaintiff.(*c*)

(*a*) No reference is given. See B. 2, c. 9.

(*b*) There was also an argument upon the form of the plea. It was objected that the plea was in abatement, whereas it ought to have been in bar, as it gave no better writ: and *Evans* v. *Stevens*, 4 T. R. 224; *West* v. *Turner*, 6 A. & E. 614; *Mostyn* v. *Fabrigas*, Cowp. 161, 172, and *Hunter* v. *Neck*, 3 M. & G. 181, were cited.

(*c*) See *Digby* v. *Alexander*, 8 Bing. 416.

Reported by H. Davison, Esq.

*663] *DOE, on the several demises of RENOW and Another, v. ASHLEY.

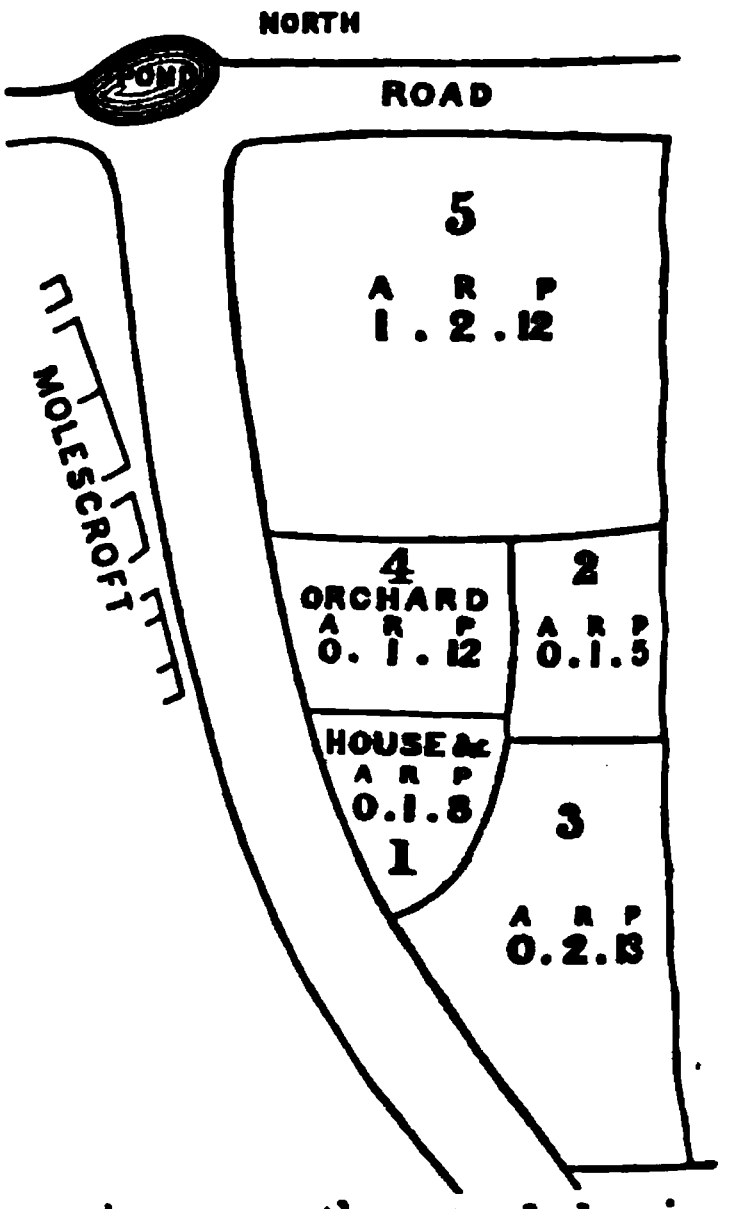
In 1814 premises were purchased by testator, which in the conveyance to him were described as containing by estimation three acres five perches, and were of that quantity or nearly so. They then consisted of a field, an orchard and a house and garden, and so remained until 1838, when the house and garden, and south part of the field, were let. Testator then made a fence which prevented all communication between the north and south parts of the field; and the tenant afterwards subdivided the south field into two. The premises continued in this condition until testator's death; he occupying the north field and orchard, and the tenant holding the residue. The north field was at the north corner of the town of M., and opposite a pond.

In 1840 testator devised "all that my messuage or dwelling house, with the out-buildings, garden, orchard and appurtenances thereto belonging," occupied by A. B., "situate on the east side of the town of M.," "and a close of land adjoining, being the close at the north corner of the town of" M., "and opposite the pond, and containing, with the garden and orchard, three acres five perches, more or less," to his daughter in fee.

By codicil in 1841, after reciting that he had given to his daughter "a close situate at" M., "being the close at the north corner of the town of M.," "and opposite the pond, and containing," &c. (as in the will), and now in my occupation:" he proceeded: "Now I do hereby revoke," &c., the devise "of the said close to my said daughter;" and devised "the same close with the appurtenances" to another daughter.

Held, on a question whether the two south fields passed by the codicil, that the description by testator's occupation was clear, that the description by quantity was uncertain, and that the north field only so passed.

EJECTMENT for lands in the county of York. On the trial, before PATTESON, J., at the Yorkshire Spring assizes, 1847, a verdict was found for the lessor of the plaintiff, subject to a case, which was stated, in substance, as follows.



The action was brought to recover the parcels of land marked 2 and 3 in the annexed plan.

*664] *Edward Ashley, being, at the time of making his will and codicil hereafter mentioned, and at his death, seised in fee of the property in question, by his will dated 30th August, 1840, devised (inter alia) as follows: "I give and devise all that my messuage or dwelling house, with the out-buildings, garden, orchard and appurtenances thereto belonging, formerly occupied by Mrs. Wainwright and Mrs. Thompson, and now by Mrs. Thompson, situate on the east side of the town of Molescroft, and a close of land adjoining, being the close at the north corner of the town of Molescroft aforesaid, and opposite the pond, and containing, with the garden and orchard, 3 acres and 5 perches, more or

less: and also," &c. (here followed a devise of other premises unconnected with the property in question); "to the use of my daughter Elizabeth Ashley, her heirs and assigns for ever." "And, in case my said daughter E. A. shall die without leaving lawful issue, then I give and devise my said messuage or dwelling house, with the outbuildings, garden, orchard and appurtenances, formerly occupied by Mrs. Wainwright and Mrs. Thompson, and the close of land adjoining being the close at the north corner of the town of Molescroft aforesaid, opposite the pond, and containing, with the garden and orchard, 3 acres 5 perches, more or less, unto Captain Percival Brown, of," &c., "for and during the term of his natural life; and, from and after his decease, I give and devise the same messuage, or dwelling house, garden, orchard, outbuildings, closes, hereditaments and premises, with the appurtenances, unto and to the use of the two sons of the said Percival Brown, their respective heirs and assigns for ever." The will proceeded: in case the said sons of Captain *Brown should die without issue, or if they and their father should die before the said Elizabeth Ashley; [*665 "then I give and devise the said messuage or dwelling house, garden, orchard, close, hereditaments and premises, unto and to the use of all and every the child and children, as well sons as daughters, of Timothy Renow, by my said daughter Sarah Ann, his wife, who shall then be living, their respective heirs and assigns for ever."

The property devised was the whole of that shown by the plan, which was correct except as to the quantities.(*a*) The entire property shown in the plan, and whereof numbers 2 and 3 are parcel, was purchased by the testator in 1814, and, in the conveyance to him, was stated to contain by estimation 3 acres, 5 perches, more or less. In 1838 Mrs. Thompson and Mrs. Wainwright, mentioned in the will, became tenants, and entered into the occupation of numbers 1, 2 and 3, and so continued until they were succeeded by Mrs. Thompson, mentioned in the will, who from thence continued tenant, and in occupation of the premises, until the testator's death. Number 2 was at the commencement of the said tenancy separated from number 5 by posts, thorns and rails; but before the date of the will they had been removed by the testator, and replaced by a quick hedge; and, from the time of the separation first above mentioned, there was no communication whatever between number 5 and number 2; and this state of things has remained to the present time. Numbers 2 and 3 were divided by more posts and rails by the said Mrs. Thompson and Mrs. Wainwright; an *opening as a means of communication being kept up between them; but the division [*666 does not now exist. From 1836 to testator's death he occupied numbers 4 and 5. Number 1 is the house and garden; number 4 is the orchard; and there were never any buildings on Nos. 2, 3, or 5.

(*a*) It was agreed that the quantities were very nearly as stated in the plan. An exact measurement was to be made if necessary.

By a codicil dated 2d February, 1841, the testator devised as follows: "Whereas I have in and by my said will given and devised to my daughter Elizabeth Ashley, amongst other hereditaments, a close situate at Molescroft aforesaid, being the close at the north corner of the town of Molescroft aforesaid, and opposite the pond, and containing, with the garden and orchard adjoining, 3 acres 5 perches, and now in my own occupation; now I do hereby revoke and annul the said devise in my said will of the said close to my said daughter E. A.; and I do declare the same to be void and of none effect whatever: and I do hereby give and devise the same close, with the appurtenances, unto and to the use of my daughter Sarah Ann Renow, and her assigns, for and during the term of her natural life: and, from and after the decease of my said daughter S. A. R., I give and devise the same close, with the appurtenances, unto and to the use of my grandson William Renow, his heirs and assigns for ever; and in all other respects I do hereby ratify and confirm my said will."

The question for the opinion of the Court was, whether the parcels 2 and 3, or either of them, passed by the codicil. If the Court should be of opinion that either of the said parcels did pass, the verdict for the plaintiff was to stand, &c.; but, if the Court should be of a contrary opinion, a verdict to be entered for the defendant.

*667] *The case was argued in last Easter term(a) by *Corrie*, for the lessor of the plaintiff. The description of quantity in the codicil (three acres five perches) renders it necessary to include Nos. 2 and 3, together with No. 5, in the general description "the close," in the reciting part of that codicil. On the other supposition, Nos. 2 and 3 must have been devised by the will, as "appurtenances" to the house and garden, to Elizabeth Ashley, and then this devise is revoked by the codicil as to 2 and 3 only. But closes of land will not pass as "appurtenances" to a house and orchard; *Bettisworth's Case*, 2 Rep. 31 b; *Smithson* v. *Cage*, Cro. Jac. 526; *Blackburn* v. *Edgeley*, 1 P. W. 600, 603: unless a clear intention appears that the word should have that effect; *Buck* v. *Nurton*, 1 B. & P. 53. But it is plain from the language of the will itself that these closes were not intended to pass under the word "appurtenances." For the testator has particularised the "garden and orchard," which might well have passed as "appurtenances;" this being the case, it would be absurd to conclude that he meant the general word to apply to fields, which ought to have been particularly described. Assuming then that the word "close" may be so far extended as to be made applicable to Nos. 2, 3, and 5 together, under the rule of construction laid down in *Doe dem. Cape* v. *Walker*, 2 Man. & G. 113, 130, that technical words are to be construed "in their proper sense, where they can be so understood consistently with the context," the only remaining difficulty in the

(a) April 27th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

*way of the construction contended for by the lessor of the plaintiff is, that Nos. 2 and 3 were not at the date of the codicil, nor had been, in the testator's own occupation. It is necessary, therefore, to reject those words as an inaccurate but superfluous description; *Wrotesley* v. *Adams*, Plowd. 187, 191, *Exception* 5; *Doe dem. Smith* v. *Galloway*, 5 B. & Ad. 43, 47; *Doe* v. *The Earl of Jersey*, 1 B. & Ald. 550; *Goodtitle, Lessee of Radford*, v. *Southern*, 1 M. & S. 299. [*668

Martin, contrà. It will appear, when the will and codicil are compared, that the construction of the devise contained in the former is not very material, and that the real question is, what passed by the codicil. But, if the construction of the devise be material, the word "appurtenances" has not so narrow a sense as has been stated: for it will pass lands, where the intention is clear; note (2) to *Smith* v. *Martin*, 2 Wms. Saund. 400, (6th ed.) The description in the codicil is plain: a close means land inclosed by a fence; and close 5 corresponds with the close in the codicil in three important particulars, viz. in being at the north corner of the town, and opposite the pond, and in the testator's own occupation. [WIGHTMAN, J. The will seems to treat everything as a close that is not orchard or garden. The description seems correct, if Nos. 2, 3 and 5 are taken as one close.]

Corrie, in reply. If the codicil is construed with the assistance of the will, it is clear that the codicil gives to the plaintiff all that the will gave to Elizabeth. It is no misdescription to refer to closes 2 and 3 as at the north *corner of the town, for they are so, as well as No. 5, in relation to the town, though inter se the latter close only is north and the former closes are south: and it should be remembered that from the time of the conveyance to the testator until 1838 the three closes were actually one. [*669 *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (May 25th), delivered the judgment of the Court.

In this case the question is whether a devise of a close, described to be situate at the north corner of the town of Molescroft, and opposite the pond, and now in the occupation of the testator, will pass, not only a close which fulfils the above description exactly, but also two other closes, not situate at the north corner of Molescroft, nor opposite the pond, nor in the occupation of the testator, because he has added in the devise, as a further matter of description, that the said close, with the garden and orchard adjoining, contains 3 acres and 5 perches, and the three closes, with the garden and orchard, contain nearly 3 acres and 5 perches, and the whole formed one purchase by the testator.

It is suggested that the three closes were considered by the testator as one; but there is no evidence to sustain that suggestion: and the fact, that the testator substituted for the more temporary separation by posts and rails a permanent separation by a live hedge, leads to a contrary conclusion.

Even if, in one part of the description, general words were found leaving it doubtful whether the three closes were included, and in another part there were words perfectly clear which excluded two of them, we think *that we ought not to reject the clear words, and give a meaning, to those which are doubtful, inconsistent with those that are clear.

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Now the description by the testator's occupation is clear: the description by quantity is uncertain in its nature, and uncertain in that the additional quantity of land required to satisfy this part of the description may be connected either with the garden and orchard, or with the close. And we have, therefore, come to the conclusion that the three closes did not pass, and that our judgment ought to be for the defendant.

Judgment for defendant.(a)

(a) Reported by H. Merivale, Esq., and H. Davison, Esq.

The QUEEN v. SCHLESINGER. *May* 22.

1. In an indictment for perjury on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken "before the sheriffs," though in fact the cause was tried before the Secondary.
2. On trial of the indictment for perjury, it appeared that, in the cause tried before the Secondary, two issues were joined on the record; but the postea showed only a verdict on one: *Held*, that these facts sufficiently bore out an allegation in the indictment that the "issues came on to be tried, and were tried,' and that the perjury was committed "upon the trial of the said issues."
3. It is a good assignment of perjury that a witness swore that he "thought" a certain writing was not his, whereas in truth and in fact he "thought" that it was his.
4. It is no good objection, in arrest of judgment on such indictment, that it charges defendant with having sworn that he had not written certain words in the presence of A., whereas in fact he had written them in the presence of A.; with an averment of materiality; for A.'s presence cannot be assumed to be necessarily an immaterial fact, though the materiality does not appear otherwise than by such averment.

PERJURY. The indictment (preferred at the Central Criminal Court) averred that, on, &c., in London, &c., and within the jurisdiction, &c., upon the execution of a certain writ of trial before that time issued, according to the form of the statute, &c., out of Her Majesty's Court of Common Pleas, &c., and directed to the sheriffs of London, in a certain action on promises then pending in the said Court, &c., in which James Wyld was plaintiff, and Thomas Flersheim was defendant, *and by which said writ the said sheriffs were commanded, pursuant to the statute, &c., that they should summon twelve, &c., who should be sworn truly to try certain issues theretofore joined between the parties, and that the said sheriffs should proceed to try such issues accordingly, and when the same should have been tried in manner aforesaid, they the said sheriffs should, on, &c., make known to the justices, &c., at Westminster what should have been done by virtue of the said writ, with the finding of the jury thereon indorsed, the said issues

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came on to be tried, and were tried in due form of law, before William Hunter, Esq., and Thomas Sidney, Esq., then being the sheriffs of London aforesaid, by a jury, &c. The count then alleged that the defendant Joseph Schlesinger came before the said W. H. and T. S., then being the sheriffs, &c., and was examined upon the trial of the said issues as a witness for James Wyld; and before the said W. H. and T. S., then being, &c., and before the said jury, &c., did, on the said trial, take his corporal oath as such witness as aforesaid, and was duly sworn, &c., they the said W. H. and T. S. then being such sheriffs, &c., and having competent power, &c., to administer the said oath, &c. And that upon the said trial of the said issues so joined, &c., and while he was being examined as such witness as aforesaid, a certain paper writing, then containing, amongst other things, the respective words written in red ink in different parts of the said paper writing, that is to say containing in writing the seven words following, written in red ink, viz., "his own name on his own record;" and in another part thereof, &c. (the count then set out other words stated to have been written in red ink on the same paper); was produced *and shown to the said Joseph Schlesinger; and that, on the said trial, certain questions [*672 arose and became material, viz., whether the said J. S. then thought, &c., and whether the said J. S. had in the presence of one William Dipple written, &c. (stating the subject matters of the answers after stated): and that the said J. S., being so sworn, &c., not having the fear, &c., and contriving, &c., then and there, to wit, &c., on the said trial of the said issues, upon his oath aforesaid, falsely, &c., before the said jurors so sworn, &c., and before the said W. S. and T. S. then being such sheriffs as aforesaid, upon his oath aforesaid did depose and swear, &c., that he the said J. S. then thought that the said words so written in red ink were not his, the said J. S.'s writing, and that he the said J. S. had not, in the presence of the said William Dipple, written the said words so written in red ink; whereas in truth and in fact the said words so written in red ink were his the said J. S.'s writing; and whereas also in truth, &c., the said J. S. then and there, and within the jurisdiction aforesaid, when he so deposed as aforesaid, thought that the said words so written in red ink as aforesaid were his, the said J. S.'s, writing; and whereas also in truth, &c., at the time when he the said J. S. so deposed as aforesaid, he the said J. S. had, in the presence of the said William Dipple, written the said words so written in red ink. And so the jurors, &c. (the ordinary conclusion).

The second count charged that the said J. Schlesinger swore that he thought the words were not in his handwriting, whereas in fact they were. The third count charged that he swore he had not written the words in the presence of Dipple.

*On the trial, before Lord DENMAN, C. J., at the London sittings after Michaelmas Term, 1845, the defendant was con- [*673

victed on this indictment. It appeared that the cause *Wyld* v. *Flersheim* was tried before the Secondary of the city of London, and not the sheriffs; and, the postea in *Wyld* v. *Flersheim* being produced, the verdict appeared to have been taken on one of two issues, without any statement as to the event of the other.

In the following term, a rule was obtained to show cause why a new trial should not be had, or a verdict of acquittal entered on account of the above mentioned variances; or why the judgment should not be arrested on the grounds: 1. That perjury could not be assigned on the averment by defendant that he "thought" the words were not in his handwriting; 2. That the third count depended on the materiality of a fact which evidently was not material, namely, that the words were written in the presence of Dipple.

Crompton now showed cause. 1. An express authority on the first point is *Regina* v. *Dunn*, 2 Moo. C. C. 297, where a trial was alleged to have taken place before the sheriff, and the proof was, that it was before a deputy sheriff, and this was held no variance: and the return to a writ of inquiry must allege the trial to have been before the sheriff, when the writ is directed to him; *Stroud* v. *Watts*, 2 C. B. 929. An inquisition held before a deputy coroner is properly described as held before the coroner; *Regina* v. *Perkin*, 7 Q. B. 165. 2. The averment that the "issues" were tried is correct: the writ directed two to be tried; and the jury was summoned on both: and, *though the verdict passed on one only, the other must have been disposed of in some manner: it may be assumed that the jury was discharged. 3. The objection, that perjury is not assignable on what a man swore that he "thought," cannot be maintained. Such an averment must of necessity be difficult of proof; but it cannot be bad of necessity. A party might, for instance, have declared on his oath that he "thought" such and such facts were true, and have afterwards owned that, while so stating, he knew them to be untrue. In *Rex* v. *Pedley*, 1 Leach, C. C. 325, Lord MANSFIELD says: "It is certainly true that a man may be indicted for perjury, in swearing that he believes a fact to be true, which he must know to be false:" *Thomas Miller's Case*, 2 W. Blackst. 881, 886, S. C. 3 Wils. 420, 428, is to a like effect. 4. As to the last point, it does not appear on the record that the fact in question was immaterial; the count alleges it to have been material; and there was no necessity to state how it became so; *Rex* v. *Dowlin*, 5 T. R. 311, 318.

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Sir *F. Thesiger* and *J. Gray*, contrà. 1. An inaccurate assignment of the person before whom the oath is administered is fatal; *Lincoln's Case*, Ry. & M. C. C. 421. When, indeed, a deputy is authorised to do an act in the name of his principal, it may be sufficient to name the principal. And this answers the authority of *Regina* v. *Perkin*, 7 Q. B. 165; for by stat. 6 & 7 Vict. c. 83, s. 1, all acts performed by a deputy coroner are to be deemed and taken, to all intents, &c., to be done by the coroner.

But, although the writ goes to the sheriff, the trial by the Secondary *is not a trial by a deputy acting in the name of his principal. [*675 The authority is given by stat. 3 & 4 W. 4, c. 42, s. 17; and sect. 18 assumes that the "sheriff, deputy or judge" is to execute the writ of trial, and directs the deputy or judge, not as sheriff, but in his own character, to certify for stay of execution, &c. In *Regina* v. *Dunn*, 2 Moo. C. C. 297, the trial appears to have been before Mr. Stapylton, "who was stated to be the deputy of the high sheriff;" but his office was not "more particularly described:" and upon this evidence it might be that he was well held to be a deputy only, acting in the name of the sheriff; 7 Bac. Ab. 184, 188, tit. *Sheriff* (H) 1, 3, 7th ed. [COLERIDGE, J. In the country, if a writ of trial is directed to the sheriff, the cause is tried before the undersheriff as a matter of course; is not the Secondary in the same position in London?] It may be so; but the statutory provision already cited seems to make it necessary that the presiding judge should be named by his proper title: and therefore in *Pippet* v. *Hearn*, 5 B. & Ald. 634, though the writ was directed to the sheriff, the inquisition was correctly averred to have been taken before the Secondary. 2. The proper proof, that certain "issues" were tried, is the indorsement on the postea; *Rex* v. *Page*, 2 Esp. N. P. C. 650; and this postea proves only one to have been finally disposed of. If the jury were discharged on the other, as is suggested, that would have been entered on the postea. 3. As to the assignment of perjury: "the deposition must be direct and absolute, and not *ut putat*, nor *sicut meminit*, nor *ut credit*, &c.," 3 Inst. 166; and this, if not a good objection in arrest of judgment, would at all events be ground for a new trial *on account of mis- [*676 direction, as the jury ought not to have been permitted to take into consideration an assignment of perjury framed as this is. 4. The last objection, also, has not been answered.

Lord DENMAN, C. J. The first objection rests, in point of fact, on the possibility of the Secondary, who appears to have tried the cause, not having authority to act as deputy to the sheriffs. But I think we are bound to take notice that the sheriff can appoint a deputy, and that the Secondary is so appointed for this purpose in London. If so, he acts in the name of the sheriff; and is correctly described as the sheriff. Possibly, it might be good to name either sheriff or deputy. But I think that *Stroud* v. *Watts*, 2 Com. B. 929, and *Regina* v. *Dunn* (which was fully argued, and the conviction upheld by nine judges), sufficiently warrant this allegation, and that to hold the contrary would be a shaking the foundations of justice. As to the second objection, the record was produced at the trial: it showed that two issues were joined: the sheriff appears to have made an inaccurate return that one only was tried: but the fact was as stated in the indictment. As to the remaining points, I think it would be highly dangerous if both were not regarded as clearly established. If a witness swears that he "thinks" a certain fact took

place, it may be difficult, indeed, to show that he committed wilful perjury; but it is certainly possible: and the averment is as properly a subject of perjury as any other. The passage cited from 3 Inst. 166, was probably meant to express no more than this, that perjury cannot be *correctly assigned on a mere statement of a general opinion. And, as to the last point, the question whether or not the words were written in the presence of Dipple may have been material; it may have been a link in the chain of proof: it is impossible to assume the contrary against the record. And, if these objections are put on the footing of misdirection, I think they rest on no more solid foundation.

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PATTESON, J. It is admitted that the writ was properly directed to the sheriff, and could not indeed have been directed to any one else. I think it follows that, in the intendment of law, the cause was tried before him to whom the writ was directed. Nor can we now allow the point to be raised which was not raised at the trial, whether the Secondary was lawfully deputed. And I do not think the consequences which Sir *F. Thesiger* draws from the words of 3 & 4 W. 4, c. 42, s. 18, really follow. It is true that the "deputy" certifies; but it does not follow that his act in certifying, as well as any other act which he does in the course of the trial, may not be legally the act of the sheriff. The objection to the assignment of perjury in the first and second counts seems to me to amount to no more than this: that, because it is very difficult of proof, therefore it is bad. But there would be an easy mode by which witnesses might, in many cases, escape the consequences of perjury, if using the saving words "I think" made them not indictable. I agree, also, that the averment respecting the presence of Dipple cannot be held necessarily immaterial. As to the objection that one issue only was tried, no doubt the postea is the proper evidence of the trial. But here the postea was produced: and *it appears that there was an error in the postea: only one issue was returned as tried: but this does not show that the issues, to try which the jury was summoned, did not "come on" for trial.

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COLERIDGE, J. I am of the same opinion. The authority of *Regina* v. *Dunn*, 2 Moo. C. C. 297, goes even farther than is necessary to support the averment in this case. The secondary is certainly in the same position as the undersheriff: the assessor who tried the cause in *Regina* v. *Dunn* might have been a distinct officer, though I do not say that he was. In stat. 3 & 4 W. 4, c. 42, s. 17, power is given to direct certain issues to be tried before "the sheriff," or "any judge" of a Court of Record for the recovery of small debts: and then, by sect. 18, the "sheriff, *deputy*, or judge before whom such trial shall be had" is empowered to certify, &c. Therefore it is plain that the acts of the deputy are those of the sheriff; or, at all events, the utmost which can be contended for on the words of that section is, that, if it were necessary to aver a certificate given, or any other act which a deputy is thereby by

name empowered to do, the deputy should be mentioned. Agreeing with the rest of the Court on the other points, I pass them over, with the exception of that respecting the "issues." It appears to me that the allegation was proved by the record and postea taken together. It appears that the jury was summoned and sworn to try "the issues." Suppose that, on one of the issues, the jury had been withdrawn: both would have "come on for trial," and have been tried. But then, it is argued, this would have been indorsed. It *ought to have been so: but, if it had, the fact would only have been the same as now. [*679

ERLE, J., concurred. Rule discharged.(a)

(a) Reported by H. Merivale, Esq.

GARRARD *v.* COTTRELL. *May* 27.

Plaintiff having accepted a bill for defendant's accommodation, defended an action brought by the indorsee, and finally paid the amount with the costs of the action. Plaintiff brought assumpsit for money paid: the jury were directed that, if defendant requested plaintiff to undertake the defence (as to which there was some evidence, but no express request proved) the costs were recoverable as money paid to the plaintiff's use. Verdict for plaintiff.

Held, that the direction was right, and the costs recoverable under the count for money paid.

ASSUMPSIT to recover 100*l*., for money lent, money paid by plaintiff for the use of defendant and at his request, money received by defendant for the use of plaintiff; interest; and on an account stated. Pleas: except as to 26*l*. 17*s*. 1*d*. paid into court, Non assumpsit, payment, and set off. Issues thereon.

By his particulars, plaintiff claimed 30*l*. 11*s*. 0*d*., as the amount of a bill of exchange, dated 26th March, 1845, at three months date, drawn by Messrs. Hoppe and Son for coals supplied to the order of the defendant, and accepted by plaintiff for the defendant's accommodation: 17*l*. 18*s*. 7*d*. "to paid noting, interest and law charges;" and other items, making the whole amount 62*l*. 17*s*. 1*d*. On the trial, before ERLE, J., at the London sittings after Easter term, 1847, it appeared that the defendant had been, at one time, in the employ of Messrs. Hoppe & Son, coal merchants, as their agent, and had become indebted to them in a balance of 30*l*. 11*s*. 0*d*.; and that he had applied to the plaintiff, his brother in law, who gave his acceptance for the amount, as stated in the particulars of demand. When the bill became due, the plaintiff defended an action brought by Messrs. Hoppe *& Co. upon it, and, the verdict being against him, paid the amount with 17*l*. 18*s*. 7*d*. costs. It appeared that the defendant had written letters showing that he was aware of the facts; but no express request from him to defend the action was proved. It was contended at the trial, on the part of the now plaintiff, that this evidence was sufficient to raise the presumption that he undertook the defence at the request of the now defendant. The money paid into Court, together with the items of set off [*680

proved, covered the plaintiff's demand, with the exception of the 17*l.* 18*s.* 7*d.* As to this, it was contended, on the part of the defendant, that he did not authorise the defence of the action *Hoppe* v. *Garrard:* but that, even if he had, the plaintiff could not recover on any of the counts in this declaration. ERLE, J., directed the jury that, if the defendant did request the plaintiff to undertake that defence, the law expenses were, in his opinion, money paid by plaintiff to defendant's use, and recoverable under that count. Verdict for plaintiff, with leave to move to enter a nonsuit.

Lush now moved accordingly. On this finding of the jury, undoubtedly, the defendant would be liable to the plaintiff for the costs of the action, if there had been a proper count. But the plaintiff cannot recover on a count for money paid. Money, to be recovered under that count, must be a sum paid to a third party, which the defendant was primarily liable to pay, and which the plaintiff either pays on the defendant's request, or makes himself liable to pay on such request; *Spencer* v. *Parry*, 3 A. & E. 331; *Lubbock* v. *Tribe*, 3 M. & W. 607.

*681] Here there *was no original liability on the part of the defendant. [PATTESON, J. In those cases there was no original liability for anything. Here the defendant was certainly liable for the bill. The costs are accessory.] The distinction between the bill of exchange and the costs is this:—that for the first there was an original liability, not for the second. [PATTESON, J. The defendant was held liable for both under the count for money paid, in *Howes* v. *Martin*, 1 Esp. N. P. C. 162.] That case is at variance with the decisions in Banc. [PATTESON, J., referred to *Dawson* v. *Morgan*, 9 B. & C. 618.] That case affords an authority, to some extent, against *Howes* v. *Martin*. At all events, in this latter case, the distinction between the original debt and the costs was not adverted to.

Lord DENMAN, C. J. I see no reason to question the authority of *Howes* v. *Martin*. It is not in opposition to any case; and there was full opportunity there to take the distinction suggested, if there had been any reason for it.

PATTESON, J., concurred.

COLERIDGE, J. My brother ERLE left it to the jury to say whether they thought the defendant requested the plaintiff to defend this action. It is not contended that this was incorrect: the question really is, whether the verdict of the jury, that the defendant did so request, was supported by the evidence. There is no reason why the request should be express.

*682] And I think *there was quite sufficient evidence for the jury to infer an implied one.

ERLE, J., concurred. Rule refused.(*a*)

(*a*) Reported by H. Merivale, Esq.

NEWTON *v.* LIDDIARD. *May* 26.

Reported, 9 Q. B. 616, note (*a*).

The QUEEN *v.* The Inhabitants of HARTPURY. *May* 27.

Reported, 8 Q. B. 566.

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*COBB *v.* ALLAN and Another. *May* 28. [*683

The council of a borough ordered that an equal borough rate should be made on the several parishes, parts and districts within the borough, for raising a sum therein specified, and that, for that purpose, the several parishes, &c., in the borough should be rated in the several amounts specified in the order, and that the part of the parish of S. which lay within the borough should be rated at 365*l.*; such several sums rated being estimated at 1*s.* in the pound upon the rateable property; and that the churchwardens and overseers of entire parishes within the borough, and the persons appointed to act as overseers for parts of parishes within the borough for making, levying, and collecting borough rates and watch rates therein, should respectively "*levy, collect and pay*" the amounts rated by the said order upon their parishes, parts or districts: the amounts so rated upon entire parishes to be paid out of the poor rates made and collected, or to be made and collected, for such parishes; and that a warrant, under the hand of the mayor and the corporate seal of the borough, should issue to the town clerk, requiring him to demand and receive of the several parish and special overseers, described as above, the amounts so rated; and, for this purpose, to issue his warrants to such overseers and persons appointed, &c., requiring them to "*collect, levy and pay*" to him the same amounts.

The council issued warrants in the prescribed terms respectively to the town clerk, who thereupon issued like warrants to the parish overseers, and to the special overseers who had been previously appointed for the said parts of parishes.

The special overseers of part of the parish of S. then made a rate thereon for 427*l.*, being at the rate of 1*s.* 2*d.* in the pound.

The town council also made an order for a watch rate, with respect to which the same proceedings were taken as above mentioned. The order rated the said part of S. at 153*l.*, being at 6*d.* in the pound; and the special overseers made their rate for 160*l.*, being at the same rate of 6*d.* in the pound. Warrants of distress were duly issued for non-payment of these several rates.

Held, in trespass for seizure under such warrants, that the orders of the town council, to "*collect, levy and pay*," empowered the parish and special overseers, under stats. 55 G. 3, c. 51, 5 & 6 W. 4, c. 76, and 7 W. 4 & 1 Vict. c. 81, to levy by means of rates.

And that, as by stat. 7 W. 4 & 1 Vict. c. 81, s. 1, the council might order the overseers of entire parishes either to pay the borough rates out of a poor rate made or to be made, or to make a special rate for payment of them, it was necessary for the orders of council to specify which of the alternatives was to be adopted. But,

That, as the quota of borough rates assessed upon part of a parish could be paid in no other manner than by a special rate, it was not necessary that the orders should direct such rate to be made.

Quære, whether the borough rate was bad for excess.

Held, that the watch rate was good.

TRESPASS for entering the plaintiff's dwelling house and taking his goods.

Plea, Not guilty "by statute." Issue thereon.

The cause was tried before Lord DENMAN, C. J., at the Kent Spring assizes in 1846, when a verdict was entered for the plaintiff, subject to the opinion of this Court on a special case.

The following were the material facts stated.

*684] *After the passing of stats. 5 & 6 W. 4, c. 76, and 7 W. 4 & 1 Vict. c. 81, namely, on 18th April, 1843, the borough fund of the borough of Rochester, in the county of Kent, being one of the boroughs within the operation of stat. 5 & 6 W. 4, c. 76, was not sufficient for payment of the expenses which would be necessarily incurred, before the end of the year 1843, in carrying into effect the provisions of that act.

On the said 18th April, 1843, Mr. Lewis, the then town clerk, as the officer of the council of the said borough, estimated in writing that 2287*l.* 5*s.* 9*d.*, in addition to the then borough fund, would be sufficient and necessary for the payment of the above-mentioned expenses.

This estimate was on the same day submitted to a meeting of the finance committee of the council, and was examined and adopted by the committee. The committee then recommended to the town council to make and levy a watch rate of 6*d.* in the pound, and a borough rate of 1*s.* in the pound, for raising 2300*l.*, or thereabouts, towards defraying the said expenses.

The estimate was, on 24th April, 1843, laid before the town council, who then ordered a borough rate, in the nature of a county rate, to be made within their said borough in order to raise the amount so estimated.

The order was as follows.

"City and Borough of Rochester." } At a meeting of the council, held on the twenty-fourth day of April, 1843, it is ordered by this council that a fair and equal rate or assessment, for and as a borough rate in the nature of a county rate, be, and the same is hereby (under and pursuant to the directions of stat. 5 & 6 W. 4, c. 76, and other the statutes in that behalf), made on the several parishes, parts and districts within

*685] this city and borough, *liable to such rate, for raising the sum of 1654*l.* 1*s.* 9*d.*, and for or towards the purposes to which by law such rate or assessment is applicable; and that for that purpose the several parishes, parts and districts within this city and borough be, and they are hereby, rated, assessed and taxed in the several amounts or sums following: (that is to say)"

Then followed the assessments for the several parishes and districts after mentioned.

That part of the parish of Strood which was within the borough was assessed at 365*l.* 8*s.*

The several sums assessed were stated to be "estimated at 1*s.* in the pound, upon the annual value of the messuages, lands, tenements and hereditaments chargeable to the said rate within the same parishes, parts and districts respectively, after the abatements from such annual value required by law in assessing poor rates." And it was "ordered that the churchwardens and overseers of the poor of the said parish of St.

Nicholas, and precinct of the Cathedral Church of Rochester, or such other persons as by law may make a poor rate for such parish and precinct respectively, and the persons appointed to act as overseers within the said parts of the said several parishes of St. Margaret, Strood, Chatham and Frindsbury which lie within the limits and jurisdiction of this city and borough, for making, levying and collecting borough rates and watch rates therein, *do respectively levy, collect and pay* the amounts so respectively above rated, assessed and taxed upon their several parishes, parts or districts, on or before the 24th day of June now next ensuing; the same amounts, so rated, assessed and taxed upon the said parish," &c. "and precinct," &c., "to be *paid out of the poor rates made and collected, or to be made or collected, for the same [*686 parish and precinct respectively. And" it was "ordered that a warrant do issue under the hand of the mayor and the corporate seal of this city and borough, directed to David Baxter Lewis, gentleman, town clerk of the said city and borough, requiring and authorising him to demand, collect and receive of the churchwardens and overseers of the poor of the said parish," &c. "and precinct," &c., "respectively, or such other persons as by law may make a poor rate for such parish and precinct respectively, and of the persons appointed to act as overseers within the said parts of the several parishes of St. Margaret," &c. "which lie within the limits," &c., "for making, levying and collecting borough rates and watch rates therein severally and respectively, the amounts so rated, taxed and assessed upon the said parish, precinct and parts respectively; and for that purpose to issue his warrants to the church wardens and overseers of the poor of the said parish," &c., "and precinct," &c., "or such other persons as by law may make a poor rate for the said parish and precint respectively, and to the persons appointed to act as overseers within the said parts of the several parishes of St. Margaret," &c., "which lie within the limits," &c., "requiring them severally and *respectively to collect and pay* to him the said D. B. Lewis in manner and by the time hereinbefore mentioned the same amount so rated, taxed and assessed as aforesaid." The order concluded by stating the steps to be taken in case of default by the above mentioned parochial officers.

After the making of the order, and on the same 24th *April, a warrant, under the corporate seal, and under the hand of the [*687 then mayor, was sent to Mr. Lewis the town clerk; the warrant was in the terms directed by the order.

There had not at any time since the passing of stat. 5 & 6 W. 4, c. 76, been any high constable of the said city and borough. After the receipt of the above warrant, Mr. Lewis, on the 13th day of May, 1843, sent his warrant to William Wood and Henry Bass, who in the month of November, 1842, had been appointed special overseers for that part of the parish of Strood which was within the borough, for making, levying

and collecting borough and watch rates, requiring them, "by virtue of an order of council" (referring to the above recited order of 24th April), "and a warrant" (referring to the above mentioned warrant), "*to levy, collect and pay*" to him, on or before, &c., "by and from a fair and equal rate, to be made and collected by you for that purpose, in such manner as the laws in that behalf direct and authorise, the sum of 365*l.* 8*s.*, being the proportion of and by the aforesaid order of the said council assessed and charged upon the said part of the said parish of Strood which lies within the limits and jurisdiction of the said city and borough, for and towards a fair and equal borough rate, in the nature of a county rate, for the said city and borough, made and levied by the said council," &c.

Messrs. Wood and Bass, on the 4th January, 1844, made a borough rate accordingly on the said part of the parish of Strood, for the sum of 427*l.* 17*s.* 0½*d.* The rate so made was "after the rate of 1*s.* 2*d.* in the pound." The plaintiff was assessed thereto, and was liable to be *so assessed if the rate was duly made. The case then stated an order by the town council for a watch rate at 6*d.* in the pound; the portion for which the borough part of the parish of Strood was rated, by the order, being 153*l.* 7*s.*; and also warrants from the corporation to Mr. Lewis, and from him to Messrs. Wood and Bass, in like manner as already stated with respect to the borough rate. Wood and Bass, in compliance with the warrant received from Lewis, made a watch rate for 160*l.* 9*s.* 5*d.* on the borough part of the parish of Strood. This was at the rate of 6*d.* in the pound. The plaintiff was assessed thereto, and was liable as aforesaid, if the watch rate was duly made.

*688]

Neither of the above rates was signed or allowed by two justices; nor was any notice of either of them published on the door of any church or chapel within the borough part of the parish of Strood, although there was a church and a chapel also in that district.

The plaintiff having refused to pay, two several distress warrants for the said rates were issued against him by the defendants, who were borough magistrates. By virtue of these warrants the alleged trespasses were committed.

The question for the opinion of the Court was, whether the defendants were liable in this action:

The case was argued, in Easter term last (April 23d),(*a*) by *Peacock* for the plaintiff, and *Peteredorff* for the defendants. The arguments will appear sufficiently from the judgment of the Court.

Cur. adv. vult.

*Lord DENMAN, C. J., now delivered judgment.

*689]

It appears to us that the order of the town council for a borough rate, and for a watch rate, were valid, and that the defendants have shown a good justification for the acts complained of.

(*a*) Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

The steps required under stats. 5 & 6 W. 4, c. 76, s. 92, and 55 G. 3, c. 51, ss. 1, 12, and 6 & 7 W. 4, and 1 Vict. c. 81, ss. 1, 3, have been taken. Each of these steps has been the subject of objections; but only two are sufficient to require notice. After making estimates for a borough rate and a watch rate, and making those rates, and, with respect to entire parishes, ordering the overseers to pay their quota out of the poor rates,—with respect to parts of parishes within the borough, in respect of which persons have been appointed to act as overseers for making, levying and collecting borough and watch rates, the town council ordered such persons to levy and collect the quota for such parts respectively.

It is objected that the orders do not expressly mention that they are to make rates: but an examination of the statutes removes the objection. By stat. 55 G. 3, c. 51, s. 12, an order of justices to the high constable, and of him to the overseers of parishes, to levy, collect and pay county rates, empowers the overseers of parishes, and special overseers for extra parochial places, to levy and raise by an equal rate or assessment such sum as is sufficient to raise the required sum; and, by stat. 7 W. 4 & 1 Vict. c. 81, s. 3, special overseers appointed for making, levying and collecting borough rates have the like powers vested in them for levying and collecting borough rates as if they were overseers of parishes. The order to levy *and collect, according to the 12th section above mentioned, empowers to levy and raise by a rate. [*690

With respect to entire parishes, the quota may be paid either out of the poor rate or by a special rate; and therefore by section 1 of stat. 7 W. 4, and 1 Vict. c. 81, above mentioned, the order of town council must specify one of the alternatives. But with respect to parts of parishes there is no alternative; the amount can be collected only by a special rate; and an order on a person specially appointed to make and collect borough rates, to collect a given amount, orders him to do so by the one method expressed in his appointment. The town council ought to rate the amount to be raised from each part of the parish. The special overseer must raise it by the powers vested in him by law, or pay it out of his own funds; and the town council have no power to specify what assessment he is to make. Besides rating, the town council may order, according to stat. 7 W. 4 & 1 Vict. c. 81, s. 1, the rate to be made. Their orders are conveyed to overseers by the officers representing the high constable: now their warrant to the town clerk orders him to order the overseers to levy by *an equal rate.*

Although stat. 7 W. 4 & 1 Vict. c. 81, recites that overseers had no power to make a borough rate, it appears by the above review that they had the power to raise by assessment a sum sufficient to raise the sum required. The warrant of the town council to the town clerk, and the warrant of him to the overseers and special overseers having been issued, the special overseers for the part of

Strood within the borough have made a borough rate, at 1s. 2d. in the pound, for 427l. 17s. 0½d., the estimate and order of the town council being at 1s. in the pound for 365l. 8s. 0d.; and a watch rate at 6d. *691] *in the pound, for 160l. 9s. 5d., the estimate and order of the town council being at 6d. in the pound for 153l. 7s. This district borough rate has been objected to on account of its excess: and an answer has been offered that a lower rate would not be sufficient to raise the sum required, after allowance for empty houses and insolvent occupations. We have not come to an unanimous opinion upon this point: nor is it necessary; for the watch rate is free from this objection; and, if either rate is valid, it will support the warrant of distress relating thereto, and maintain the defence in this action. Therefore our judgment will be for the defendants. Judgment for defendants.(a)

(a) Reported by H. Davison, Esq.

WOOLMER and Others v. TOBY. *May* 29.

The prospectus of an intended railway company contained a list of "Provisional directors," and announced that applications for shares were to be made to "the Provisional Committee of Management." A committee of management, with a chairman, was subsequently appointed by a resolution of the provisional committee, and thenceforward managed the affairs of the company. Defendant made an application for shares in the form prescribed, which contained a promise to pay deposits, and received a letter of allotment from the secretary of the company, stating that scrip certificates would be delivered in exchange for such letter. At the foot of the letter was a receipt for deposits signed by one of the company's bankers. The form of the receipt purported that the amount payable on deposits had been received "on account of the provisional committee."

Held, that the defendant's contract to pay the deposits was made with the provisional committee at large, and that the committee of management could not maintain an action for the non-payment.

Some of the provisional directors having withdrawn, and other persons having become such directors, between the application for shares and the allotment: *Quære*, whether defendant had the option of taking or refusing the shares allotted.

ASSUMPSIT. The declaration stated that on 1st September, 1845, the plaintiffs had agreed together with divers, to wit, 150, other persons to endeavour to form and establish a joint stock company, to be called the *692] Direct Exeter, Plymouth and Devonport *Railway Company, for the purpose of forming, making and constructing a railway from Exeter to Plymouth and Devonport, for the conveyance of passengers and goods; and to endeavour to obtain an act of parliament for that purpose; and which railway could not be made, constructed or executed without the authority of Parliament; and the capital of which proposed Company was to consist of 1,000,000l., to be divided into 40,000 shares of 25l. each, and upon which a deposit of 2l. 12s. 6d. for each and every share was to be paid, and which deposit was to be paid by such persons respectively as should apply for and to whom the said shares respectively should be allotted by a committee of management of the proposed Company. That, before and at the time of defendant's applying for shares, and also at the time of making his promise, as hereinafter mentioned,

plaintiffs formed and were the committee of management of the proposed Company. That, on 15th October, 1845, defendant had applied to plaintiffs, so being the committee of management, and requested them to allot him fifty shares in the proposed Company, or such a less number as they might think fit to appropriate to him: and thereupon, on 15th December, 1845, plaintiffs, at the request of defendant, allotted to him forty such shares, upon certain terms then agreed upon by and between plaintiffs and defendant, that is to say, that a deposit of 2*l*. 12*s*. 6*d*. upon each and every of such shares should be paid by defendant to one of certain bankers then appointed and agreed upon in that behalf, to wit, &c. (mentioning several bankers), on or before 20th December, 1845; and that scrip certificates should be delivered by the proposed Railway Company, in exchange for a certain letter of allotment, by which plaintiffs notified to defendant the said allotment of his *shares, [*693 and the receipt at foot thereof signed by one of the said bankers; and that notice should be given by the Company, by advertisement or circular, of the times and places appointed for execution of the parliamentary deeds of the Company, when the scrip would be delivered: And thereupon, in consideration of the premises, and that plaintiffs, at defendant's request, then, to wit, on 15th December, 1845, promised him to fulfil the said terms on their part, defendant then promised plaintiffs to fulfil the said terms on his part. And although plaintiffs were always ready and willing to perform the said terms on their part, and although the said 20th December elapsed after the said promise of defendant and before the commencement of this suit, yet defendant, disregarding his said promise, did not nor would, on or before the said 20th day of December, pay to any or either of the said bankers, or at all, the said deposit of 2*l*. 12*s*. 6*d*. per share, &c.

Pleas. 1. Non assumpsit. Issue thereon.

2. That plaintiffs had not agreed together with the said other persons to endeavour to form and establish the said Joint Stock Company in the declaration mentioned in manner, &c. Issue thereon.

3. That plaintiffs did not form, nor were, the committee of management of, the proposed company, in manner, &c. Issue thereon.

4. That defendant did not apply to plaintiffs, or request them, to allot to him fifty shares in the proposed Company, or such a less number as they might think fit to appropriate to him; nor did plaintiffs allot to him forty such shares upon the said terms in the declaration mentioned; nor were the said terms agreed upon by and between the plaintiffs and defendant in manner, &c. Issue thereon.

*5. That plaintiffs were not always ready and willing to perform the said terms, &c. Issue thereon. [*694

6. That plaintiffs procured defendant's promise by fraud and covin. Replication, traversing the plea; and issue thereon.

On the trial, before ROLFE, B., at the Exeter Spring assizes, 1846, it

appeared that the plaintiffs were the managing committee of a projected railway company called "The Direct Exeter, Plymouth and Devonport Railway Company," and that this action was brought to recover 105*l.*, as the amount of deposits payable by defendant, at the rate of 2*l.* 12*s.* 6*d.* a share, on forty shares, allotted to him under the following circumstances.

On 19th September, 1845, the Company was provisionally registered under stat. 7 & 8 Vict. c. 110. Their prospectus was in the following form.

"Direct Exeter, Plymouth and Devonport Railway, by Chudleigh, Ashburton and Buckfastleigh. (Provisionally registered, pursuant to 7 & 8 Vict. c. 110.)

"Capital, 1,000,000*l.*

"In 40,000 shares of 25*l.* each. Deposit 2*l.* 12*s.* 6*d.* per share.

Provisional Directors."

Then followed the names of about eighty Provisional Directors, "with power to add to their number," and a description of the line.

"Applications for shares may be made through all respectable brokers, in the annexed form, to the solicitors of the Company and to the secretary.

"Form of application for shares.

"To the Provisional Committee of Management of The Direct Exeter, Plymouth and Devonport Railway.

*695] *"I request you will allot to me shares of 25*l.* each in the above railway; and I undertake to accept the same, or such number as you may appropriate to me, subject to the regulations of the Company; also to sign the necessary legal documents, and to pay, when required, the deposit of 2*l.* 12*s.* 6*d.* per share."

The prospectus did not contain any list of managing committee; nor was any such committee established until October. On the 4th of October it was resolved, at a meeting of the Provisional Committee, that the whole of the members of the Provisional Committee should be summoned for the purpose of appointing (inter alia) a committee of management. And at a meeting of the Provisional Committee, held on the 7th of October, it was resolved "that the number of the committee of management be limited to twelve, with power to add three to their number;" that the plaintiffs, all of whom were members of the Provisional Committee, should constitute such managing committee; and that the plaintiff Woolmer should be the chairman. In consequence of this resolution, the plaintiffs took upon themselves the management of the affairs of the Company, and acted in the character of a committee of management. On 13th October, defendant sent (addressed "to the Provisional Committee of management") an application, in the prescribed form, for fifty shares. The total number of shares applied for was about 45,000. In consequence of an extraordinary depression in the money and railway share markets, the allotment was delayed until 15th December. On that

and the two following days, the allotment was proceeded with; and about 36,000 shares, and no more, were allotted. On 15th December, a letter of allotment, containing the *following terms, was sent by the secretary of the Company, to the defendant. [*696

"Direct Exeter, Plymouth and Devonport Railway," &c.

"Sir,—I am instructed to acquaint you that the committee have allotted you forty shares in the above undertaking, on which a deposit of 2*l.* 12*s.* 6*d.* per share must be paid to one of the undermentioned bankers on or before Saturday, the 20th day of December instant. The plans, sections, &c., have been duly deposited, and all the necessary notices published. Scrip certificates will be delivered in exchange for this letter and the receipt at the foot signed by one of the bankers; and notice will be given by advertisement or circular of the times and places appointed for execution of the parliamentary deeds, when the scrip will be delivered." (Signed) F. G. FARRANT, Sec. pro tem.

At the foot of the letter was the form of banker's receipt: "Received, on account of the Provisional Committee of The Direct Exeter, Plymouth and Devonport Railway Company, the sum of pounds, to account for to them on demand." Then followed the names of bankers.

The defendant and all the other allottees made default in payment of the required deposit; a few of them, however, at the commencement of the following year, paid 3*s.* a share, to the "Provisional Committee" at their request, to defray the expenses incurred by them on behalf of the Company. The undertaking was not proceeded with in the ensuing session of parliament. It appeared that, between the defendant's application for shares and the allotment, a few changes had taken place in the list of provisional directors, some of those whose names had been *published in the prospectus having retired, and new directors having been put on the committee. [*697

Several objections were taken by the defendant as a ground of nonsuit. The principal objections were that the contract, if any, was with the Provisional Committee at large, and not with the committee of management; that there was no contract, inasmuch as there had been changes in the body of the Provisional Committee between the application for shares and the allotment; and that the total number of shares allotted was insufficient.(*a*) The learned Judge gave leave to move to enter a nonsuit on these objections. The only question left to the jury was, whether the plaintiffs had made the allotment in reasonable time, the learned Judge saying that he could not see that the delay was unreasonable. Verdict for plaintiffs.

Kinglake, Serjt., in Easter term, 1846, obtained a rule nisi for a nonsuit according to the leave reserved, and in arrest of judgment, and also for a new trial on the grounds of misdirection, and that the verdict was against evidence. In Easter term last,(*b*)

(*a*) On this point *Fee* v. *Clifton*, 6 Bing. 776, was cited on the subsequent motion.
(*b*) April 26th. Before Lord DENMAN, C. J., PATTESON, WILLIAMS and ERLE, Js.

Crowder and *Greenwood* showed cause, and contended, with respect to the question whether the committee of management were the proper plaintiffs (which was the only point decided by the Court), that, the defendant's application having been addressed to "the Provisional Committee *of Management*," the letter of allotment in answer must be taken to have come from the same *committee, and that the contract, therefore, was made with the plaintiffs. That the direction for payment of deposits to the account of the provisional committee was a subordinate matter of account, merely, and immaterial. That, although the plaintiffs were agents, it could not be shown who was their principal, or by whom the defendant could be sued, if not by the plaintiffs. That such an action was always maintainable by those with whom the contract was made, although others might be interested in it; *Skinner* v. *Stocks*, 4 B. & Ald. 437; *Lloyd* v. *Archbowle*, 2 Taunt. 324, and *Mawman* v. *Gillett*, 2 Taunt. 325, note (*a*), there cited; and that no prejudice could arise to any right of set off.

*698]

Kinglake, Serjt., and *Montagu Smith*, contrà. If the prospectus had not directed applications for shares to be made to "the Provisional Committee *of Management*," there could be no difficulty in the case. But these words did not signify a managing committee as a body distinct from the provisional directors at large. When the prospectus issued, no separate committee of management was in existence: it was afterwards appointed by the provisional directors, and was made up entirely of members selected from their own body. This shows that applications were to be made to the provisional committee at large; and it appears by the form of receipts that the allotment was made by the same committee.

Secondly, even if the committee of management were a distinct body, they were agents at the utmost, and cannot maintain this action; *Evans* v. *Evans*, 3 A. & E. 132: and the case would not be varied if the deposits had been made payable to them; *Pigott* v. *Thompson*, 3 B. & P. 147. The names of the *members of the committee of management were not disclosed; and, if they can be called agents in the proper sense of the term, the case is that of an unascertained agent whose principal is known: such an agent cannot insist that the contract was with himself.

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Cur. adv. vult.

Lord DENMAN now delivered the judgment of the Court.

In this case, first, the prospectus, and certain resolutions, showing a provisional committee, and a part thereof as committee of management, and directing applications for allotments to be directed to the committee of management, and, secondly, the application of the defendant so directed, and, thirdly, the answer announcing the allotment from that body, were relied on for the plaintiffs to prove an express contract with them, being the committee of management. On the part of the defendant it was contended that his application for shares was made to the

general body, and sent to the committee of management as a part of that body appointed for convenience of communication, but not as having separate rights or powers. And, to support this, he argued that applications to be admitted to a joint undertaking would be swayed much by considering who were joined therein, and that, in this case, between the application and allotment some names had been withdrawn from the provisional committee, and some had been added, and that after such a change, which may have materially altered his view, he ought to have the option of taking or refusing the allotted shares.

Upon considering these facts, we think that the plaintiffs have not proved the defendant's contract to *have been made with them; [*700 and that a nonsuit ought to be entered.

The defendant objected also to the time of the allotment, and the change that had occurred in the state of the company between that time and the time of his application; and we think there was great weight in the objection, as well as in the question, whether the defendant's proposal was accepted under the circumstances in reasonable time: but these are rather grounds for new trial than nonsuit; and we do not enlarge on them, as defendant is entitled to his rule absolute on the other ground. Rule absolute for a nonsuit.(a)

(a) Reported by Davison, Esq.

The QUEEN, on the Prosecution of the Poor Law Commissioners, *v.* The Overseers of the Poor of the several Townships comprised in the OLDHAM Union. *May* 29.

The Poor Law Commissioners have jurisdiction to order that the overseers of the townships comprised in an union shall appoint a returning officer for an election of guardians.

Semble, per Lord DENMAN, C. J., *dubitante* COLERIDGE, J., that, if an order of the Commissioners be on a subject matter within their general jurisdiction, its legality in other respects can be questioned only on removal by certiorari, and, in default of such removal, a mandamus will go to enforce it.

MANDAMUS. The writ recited an order of the Poor Law Commissioners, of 14th January, 1837, constituting the Oldham Union, comprising several townships; and another order of 15th November, 1845, directed to the guardians of the poor of the Oldham union, and churchwardens and overseers of the poor of the several townships, reciting the former order, and that, by reason of default of election, no elective guardians existed in the said union, but that it was expedient that the mode *of conducting such election as prescribed in the said first mentioned order should be altered in the manner thereinafter set [*701 forth; and by which last mentioned order the Commissioners, under the authority of stat. 5 & 6 Vict. c. 57,(a) directed that an election of guardians for the several townships, &c., in the said union should forth-

(a) See sect. 11.

with take place, and under the authority of the same act, rescinded the provisions of the first order respecting the election of guardians, and ordered "that the overseers of the poor of the several townships comprised in the said union should, on the 22d December then next, meet at the Town's office, Oldham, and appoint some fit and competent person, being a barrister at law, or a solicitor or an attorney, to be the returning officer at such election." The writ then set out that the overseers of the poor did not appoint any returning officer, and still refused to do so, and that there were still no elected guardians; and commanded the overseers to obey the last mentioned order, and appoint such returning officer. The overseers returned, amongst other matters, that the order was not made under and by virtue of the recited or any act of parliament, &c.; and that it was not stated therein whether the returning officer was to be paid, nor was his office, nor were the limits and places wherein it was to be exercised, properly defined, &c. The Commissioners pleaded to this return, setting out the order at length.

Demurrer to the plea, assigning several causes, of which the principal were those suggested in the return.

Cobbett, in support of the demurrer. It is intended to raise one point only: whether the order to appoint a *returning officer is legal. *702] [Lord DENMAN, C. J. Can you raise that point, without having brought up the order by certiorari?] It is an objection to the writ of mandamus, as well as to the order. [Lord DENMAN, C. J. But is not the writ good primâ facie, unless you have taken objection to the order in the regular manner?] By stat. 4 & 5 W. 4, c. 76, s. 105, orders of the Poor Law Commissioners, which are removed by certiorari, are to be obeyed, unless and until they are declared illegal by the Court. But the section does not prescribe that those which are not removed by certiorari are to be obeyed.(a) The words are "unless and until," not "unless." Sect. 98 provides against disobedience to such orders only as the Commissioners may lawfully make. It does not specify any exclusive manner in which their legality is to be questioned. To put an extreme case, suppose an order made to do something wholly without the sphere of the Commissioner's authority. [Lord DENMAN, C. J. A distinction must be taken between orders on matters out of their jurisdiction, and improper orders on matters within their jurisdiction.] Here, no such officer as a returning officer is named in the act; nor would the constituting such an officer be within the general enumeration of subjects of orders in sect. 15. [ERLE, J. By sect. 40, the votes for guardians are to be "given or taken in writing, collected, and returned in such manner as the said Commissioners shall direct;" they may therefore direct the appointment of an officer to return them.]

Tomlinson, contrà, was not called upon.

(a) See *Regina* v. *Churchwardens and Overseers of Bangor*, antè, p. 91.

*Lord Denman, C. J. I think the Commissioners clearly have authority to make this regulation. If, indeed, it can be [*703 shown, on the face of an order, that it purports to do something altogether out of the Commissioners' jurisdiction, such an order must fall of itself. But, undoubtedly, that which we are now considering is within their general powers. It is a method which they have taken of putting into execution powers which they undoubtedly possess. If they have chosen a wrong method, it can be questioned only on removal by certiorari.

Patteson, J. By stat. 4 & 5 W. 4, c. 76, s. 40, the Commissioners have power to direct the manner in which votes at the election of guardians shall be returned. And by sect. 46 they may direct the guardians to appoint paid officers, for the purposes there specified, and for "otherwise carrying the provisions of this act into execution."(a) Combining those two enactments, it appears to me that the order is justified.

Coleridge, J. I entertain some doubt whether the objection could not be taken in this form, if good. I think, in all probability, the legislature intended that such an order as this should only be questioned on certiorari; but I am not satisfied that the words of sect. 105 have this effect. Very distinct language is required, to take away the right of refusing to do things illegally ordered.

Erle, J. I think that the necessary power to make this order is given by sects. 40 and 46. I suppose it *could not be ques- [*704 tioned that the Commissioners might give such a direction to the overseers of a parish: and I can see no reason why they may not equally order the guardians of an union to concur in such an appointment. Judgment for the Crown. Peremptory mandamus awarded.(b)

(a) *Tomlinson* referred to stat. 7 & 8 Vict. c. 101, s. 20, in which "the returning officer," at an election of guardians, is mentioned as an existing officer.

(b) Reported by H. Merivale, Esq.

ROBSON *v.* OLIVER and Another. *May* 28, *June* 1.

To a declaration for goods sold, the defendant pleaded that he transferred to plaintiff promissory notes made by L. and Co., &c., which plaintiff accepted on account of the debt, and that plaintiff did not, within a reasonable time, present them. Replication, that, on the day before the transfer, and without the knowledge of plaintiff, L. and Co. "became and were bankrupts and insolvent," and that they "continued such bankrupts," &c., and unable to pay the notes: that afterwards, and before a reasonable time for presentment, plaintiff discovered the bankruptcy, and that, within a reasonable time after such discovery, &c., he gave defendant notice of the premises, and offered to return the notes: rejoinder, that plaintiff did not give the notice till after the expiration of a reasonable time for presenting the notes for payment. Demurrer.

Held that plaintiff was only bound to give such notice within a reasonable time after he acquired the knowledge, and not, necessarily, before the expiration of time for presentment. Judgment for plaintiff.

Debt in 150*l.* for goods sold and delivered, and on an account stated.

Plea 4. As to so much of the causes of action as relates to the sum of 45*l.*, parcel, &c.: that, after the accruing of the said causes of action in the introductory part of this plea mentioned, and before the commencement of this suit, to wit, on 14th April, 1846, defendants transferred and delivered to plaintiff, for and on account of the said sum of 45*l.* and all causes of action in respect thereof, divers, to wit, five, promissory notes of and belonging to the defendants, and of which defendants then were the bearers and entitled to demand payment: that is to say, four certain promissory notes by each of which certain persons therein described by the name, style and firm of Latham and Company, promised to pay to a certain person therein described as Mr. F. Gregory, or *bearer, 10*l.* on demand, at a certain place therein named, to wit, at Dover in the county of Kent, or at a certain other place, to wit, in London, that is to say at a certain place there known as the banking house of Messrs. Barnetts, Hoare & Co., bankers, London; and also a certain other promissory note whereby, &c. (describing a note by which Latham & Co. promised to pay F. Gregory, or bearer, 5*l.* on demand, at Dover, or at the banking house of Barnetts, Hoare & Co., bankers, London): and the plaintiff then accepted and received the said promissory notes for and on account of the said sum of 45*l.*, and all causes of action in respect thereof. That plaintiff did not, nor did any other person, within a reasonable time of the said transfer and delivery, or at any time before the commencement of this suit, present the said promissory notes, or any of them, to the said persons therein described as Messrs. Latham & Co., or to any person on their behalf, at Dover aforesaid, or at the said banking house at London aforesaid, or at any other place; nor was any demand of the said sums of money in the said notes respectively mentioned made by or on behalf of the plaintiff, or at all, upon the said Messrs. Latham & Co., or any person on their behalf, at Dover aforesaid, or at the said banking house, or at any other place, within a reasonable time after the said notes were so transferred and delivered, or at any time before the commencement of this suit. Verification.

*705] Replication to plea 4. That, after the making of the said notes, and on the day before the same were so transferred and delivered by defendants to plaintiff as in the fourth plea mentioned, to wit, on 13th April, 1846, the said Messrs. Latham & Co. became and were bankrupts *and insolvent, and wholly unable to pay the said notes or any or either of them or any part thereof, and they continued such bankrupts and insolvent and wholly unable to pay the said notes or any or either, &c., until at and after the time when plaintiff tendered and offered to return to defendants the said notes, and until defendants refused to take the same back, as hereafter mentioned, and from thence hitherto; nor would any person or persons on their behalf at any time during the time aforesaid have paid the said notes or any or either, &c. That,

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before or at the time of the said transfer and delivery to him of the said notes, the plaintiff had not notice or any knowledge whatever that the said Messrs. Latham & Co. had so become bankrupts or insolvent, or that they were unable to pay the said notes or any or either, &c. That afterwards, and before a reasonable time had elapsed after the said transfer and delivery of the said notes to the plaintiff for the presentment of the same to the said Messrs. Latham & Co. or to any person on their behalf at Dover aforesaid, or at the said banking house at London aforesaid, or elsewhere, for payment thereof, to wit, on 18th April, 1846, plaintiff for the first time discovered and had notice or knowledge of the said Messrs. Latham & Co. having so become bankrupts as aforesaid, or of their being so insolvent or so unable to pay the said notes as aforesaid. That within a reasonable time after such discovery, and after they so had notice or knowledge of the said facts or of any or either of them, and before the commencement of this suit, to wit, on 20th April, 1846, plaintiff gave defendants notice of the premises; and, being holder of the said notes, then tendered and offered to defendants to return and *deliver up to them the said notes, and requested defendants to [*707 pay plaintiff the said sum of 45*l*., parcel, &c. But defendants then and from thence hitherto have wholly refused to accept or receive back the said notes or any or either of them, or pay to plaintiff the said sum of 45*l*., parcel, &c. And plaintiff further says that, had the said notes, or any or either of them, at any time after the said Messrs. Latham & Co. became bankrupts or insolvent or unable to pay the same as aforesaid, or after the said transfer and delivery thereof by defendants to plaintiff as aforesaid, been presented to the said Messrs. Latham & Co., or to any person on their behalf, at Dover aforesaid or at the said banking house at London aforesaid, or at any other place, for payment thereof, the same would not, nor would any or either of them or any part thereof, have been paid by the said Messrs. Latham & Co., or by any person or persons on their behalf or otherwise; and the defendants sustained no loss or damage whatever by the nonpresentment of the same to the said Messrs. Latham & Co., or to any person on their behalf, at Dover aforesaid or at the said banking house, &c., or otherwise, for payment thereof; of which premises defendants also, at the time of the said tender and offer to redeliver and deliver up to them the said notes as aforesaid, had notice. Verification.

Rejoinder. That defendants were the holders of the said notes, as in the fourth plea mentioned, in the regular course of business; and that, so being such holders, they transferred and delivered the said notes to plaintiff, as in the said plea mentioned, in the like regular course of business, and in the sincere and bonâ fide belief and expectation that the said notes and each of them would be duly paid and honoured upon the *same being presented for payment according to the tenor, [*708 &c., thereof; and that defendants had not at the time of the

delivery or transfer of the said notes to plaintiff, nor at any time before plaintiff gave defendants the said notice in the said replication alleged to have been given by plaintiff to defendants, or before he so tendered and offered to return and deliver up the said notes as in the replication mentioned, any knowledge, notice, belief or suspicion, or any reason to know, suspect or believe, that the said Messrs. Latham & Co. had become or were bankrupts or insolvent, or unable to pay the said notes or any of them, or that the said notes or any of them would not be duly honoured and paid; nor had any fiat or fiats in bankruptcy then issued against the said Messrs. Latham & Co. And defendants further say that plaintiff did not give defendants the said notice in the said replication alleged to have been given by plaintiff to defendants, or any notice of the premises in that replication mentioned, or of any part thereof, until after the expiration of a reasonable time for the presentment for payment of the said notes; nor did plaintiff tender or offer to return or deliver up to defendants the said notes or any of them, or request defendants to pay plaintiff the said sum of 45*l*., at any time after the said transfer and delivery of the said notes to plaintiff, and before the expiration of such reasonable time as last aforesaid. Verification.

Demurrer, assigning for causes, among others, that the rejoinder did not sufficiently confess and avoid, or deny, the matters in the replication, and was improper and immaterial, and was double, inasmuch as it traversed both the tender and the notice of the premises stated in the replication. Joinder.

*709] Plea 5. As to so much, &c. (45*l*., parcel, &c., as in *plea 4), that after the accruing, &c., and before the commencement of this suit, to wit, on, &c., defendants transferred and delivered to plaintiff, for and on account of the said sum of 45*l*. and all causes of action in respect thereof, divers, to wit, five, promissory notes of and belonging to defendants, and of which defendants then were the bearers and entitled to demand payment, that is to say, &c. (promissory notes described as in last plea). And plaintiff then accepted and received the said promissory notes in this plea mentioned for and on account of the said sum of 45*l*., and of all causes of action in respect thereof. And defendants further say that no due or sufficient notice of the dishonour, or any notice of the dishonour, of the said notes in this count mentioned, or any of them, has been given to defendants. Verification.

Replication to plea 5, excusing presentment in the same terms as the replication to plea 4.

Demurrer on several grounds; the principle being that the replication neither confessed and avoided nor denied the plea, and left it uncertain whether plaintiff intended to excuse notice of dishonour, or to allege that sufficient notice of dishonour had been given: if the former was intended, then the matter alleged by way of excuse was insufficient: if the latter, the replication should conclude to the country. Also, that it

did not state any proceedings in bankruptcy or insolvency, or that any such fact was known to defendants, or that any fiat had issued, &c., before plaintiffs gave the notice mentioned in the replication. Joinder.

Cowling claimed to begin, on the ground that, where there were cross demurrers by plaintiff and defendant, the plaintiff ought to begin, and that the Court of *Exchequer had so held.(a) But *The Court* directed *Rew*, for the defendants (who had demurred earliest), to begin.(b) [*710

Rew, for the defendants. The question on the rejoinder to the replication to the fourth plea is a substantial one: whether, where presentment of a note for payment is excused, and the party holding offers to return it, that offer to return must be before the time for presentment. But, independently of this, the question is, whether the replication to either plea contains any sufficient excuse for non-presentment. The first point was considered in *Turner* v. *Stones*, 1 Dowl. & L. 122, where, however, it was only established that in cases where a party holding notes need not present them at a banker's he must return them promptly. The doctrine to be derived from *Camidge* v. *Allenby*, 6 B. & C. 373, *Henderson* v. *Appleton*, Chitty on Bills, 356, 7 (9th ed.), and *Rogers* v. *Langford*, 1 C. & M. 637, S. C. 3 Tyr. 654, is, that the necessity for presentment is dispensed with, if the party receiving the notes, on hearing of the stoppage, should offer within due time to return them. And in *Camidge* v. *Allenby* this question of due time was considered; and, although the holder returned the notes a week only after the stoppage, and no loss was shown to have resulted to the defendant from the delay, yet the holder was deemed not entitled to recover. The dicta, in all those cases, are in favour of the defendant here. In Story on Bills of Exchange, §476, the rule is laid down distinctly as to bills. Whether "a bill be payable by a private person, or by a banker, *it must be presented for payment at the proper time and place, exactly as if there had been no bankruptcy, or insolvency, or stoppage of payment of the drawee." And the rule, as to dispensation with this necessity, which the same author lays down (ibid.) is that, if the bankruptcy, insolvency, or stoppage of payment "takes place before presentment can be made for payment, and the holder, before the time for the presentment expires, offers to return it" (the bill) "to the party, from whom he has received it, and the latter refuses to take it back," &c., "such conduct will dispense with the necessity for any such presentment." But there is no allegation here, in the replication to the fourth plea, of any offer to return, or, in the replication to the fifth plea, of any notice of dishonour, before the time for presentment had expired. The doctrine of dispensation with allegations of notice in [*711

(a) See *Williams* v. *Jarman*, 13 M. & W. 128; S. C. (rather more fully on this point), 2 Dowl. & L. 212.

(b) See *Hilton* v. *Lord Granville*, 5 Q. B. 701, 710.

these cases seems to have arisen from a principle of convenience; and it would be very dangerous to carry it beyond existing limits; *Carter* v. *Flower*, 16 M. & W. 743; *Bowes* v. *Howe*, 5 Taunt. 30. *Esdaile* v. *Sowerby*, 11 East, 114, is to the same effect. *Moule* v. *Browne*, 4 New Ca. 266,(*a*) shows that the strictness required as to time of presentment is not dispensed with, in the case of a check payable to bearer, by the circumstance that the name of the party sought to be charged is not on the check.

The replication is also defective in not alleging the bankruptcy of Latham & Co. in the regular manner, by stating the proceedings.

*712] Further, as to the causes assigned for demurrer, either *the rejoinder demurred to is good or the replication to the fifth plea is bad; for, if the rejoinder does not confess and avoid, neither does the replication to the fifth plea.

Dennis v. *Morrice*, 3 Esp. N. P. C. 158, shows that the averment that no damage was sustained by the defendants is immaterial; and the same conclusion is to be deduced from the decisions in *Rogers* v. *Langford*, 1 C. & M. 637, S. C. 3 Tyr. 654, and *Carter* v. *Flower*, 16 M. & W. 743.

Cowling, contrà. Both the 4th and 5th pleas are bad in substance. The 4th proceeds on the assumption that, where a debt is due, as in the present instance, to the plaintiff, and his debtor gives him the promissory note of another party, payable on demand, the plaintiff cannot sue for the original debt until he has presented the note for payment: the 5th assumes the same as to notice of dishonour. The authorities do not support these propositions. The case has been argued as if this was an action brought upon the notes. But it is brought on the original debt. A banker may sue his customer for a debt due on a banking account, without presenting notes which may have been deposited with him on the same account. There are, in fact, two classes of cases: one, where a note or bill, which has time to run, is given in satisfaction of a prior debt, in which case the right of action is suspended until the note becomes due; and the other, where the note became due before the commencement of the action, and the plaintiff still holds it in his hands unpaid. But, to render presentment necessary, some agreement or

*713] *privity must be imported into the transaction beyond that which arises from the mere circumstance of the plaintiff's taking the notes; *Swinyard* v. *Bowes*, 5 M. & S. 62, cited in *Camidge* v. *Allenby*, 6 B. & C. 373. The latter case was decided expressly on the ground that the holder kept the note in his hands for a week after he had notice of the insolvency; which was held laches, whereby he made the note his own. But the defendants are not in the position of a party to the note. [PATTESON, J. In *Camidge* v. *Allenby*, BAYLEY, J., says, "The defendant was a party to the notes, for they were payable to the bearer on

(*a*) See *Robinson* v. *Hawksford*, 9 Q. B. 52, 57. It does not appear from the report of *Moule* v. *Brown* whether the defendant's name was on the check. He is, however, said to have been sued "on a banker's check."

demand, and he was the holder of them."] The pleas are also ill for not showing that the plaintiff is still the holder of the notes; *Price* v. *Price*, 16 M. &. W. 232. [PATTESON, J. That case turns on a totally different question. *Camidge* v. *Allenby* is precisely like this, except that the point arose on the general issue.] In *Henderson* v. *Appleton* (Chitt. on Bills, 357, 9th ed.), BAYLEY, J., explains the ground of that decision as has already been stated, namely, laches on the part of the holder, which is not averred here.

The rejoinder to the fourth plea is bad: it assumes that the plaintiff was bound to give notice of the makers' insolvency within a reasonable time before the time for presentment expired. There is no reason for this. It was sufficient if the notice was given within a reasonable time after the bankruptcy. The whole doctrine of dispensation was considered in *Turner* v. *Stones*, 1 Dowl. & L. 122; and the excuse for non-presentment which was held valid there is in substance the same with that offered here, and upholds the replications to each plea.

Rew, in reply. From *Kearslake* v. *Morgan*, 5 T. R. 513, *James* v. *Williams*, 13 M. & W. 828, and *Mercer* v. *Cheese*, 4 Man. & G. [*714 614, it appears to be unnecessary that the pleas should allege the plaintiff to be still holder, at any rate where the note is that of a third person. The replication has not been successfully defended. Undoubtedly, it is a question of some nicety and importance, what is the proper day for the return of notes under these circumstances. And in *Camidge* v. *Allenby*, 6 B. & C. 373, 383, and *Rogers* v. *Langford*, 1 Cr. & M. 637, 643, S. C. 3 Tyr. 654, 662, the Judges name a day on which the return would have been in time; whence it may be inferred that they thought any posterior day too late. There is no averment here that these are bank notes, commonly circulated as cash, which might put them on a different footing as regards the excuse for non-presentment; *Turner* v. *Stones*, 1 Dowl. & L. 122, 131.

Lord DENMAN, C. J. I do not consider the case without difficulty as regards the fourth plea, replication and rejoinder. I can scarcely apply the ordinary test of reasonable time to such a notice as this, intended to excuse presentment. It seems to me that the holder of a note ought to communicate instantly his knowledge that the party to whom it was to be presented has become insolvent. But it may be questioned whether the rejoinder raises this point. And in other respects the replication to the fourth plea is clearly good. It was indeed objected that it does not appear that the party was notoriously bankrupt or insolvent; but that is immaterial: it is sufficient that he is shown to have been unable to pay these particular notes.

*PATTESON, J. This is an action for goods sold and delivered. [*715 The fourth plea is, that the defendants gave certain promissory notes, payable on demand, on account of the debt: and that these notes were not presented either at Dover or in London within a reasonable

time. If the plea rested here, it would be good. If A. gives B. a promissory note made by another person (not his own, as in *Price* v. *Price*, 16 M. & W. 232), payable either on demand or at a future day, and the note is taken in account, B. must present it in a reasonable time, just as if it had been indorsed to him. The replication justifies the non-presentment, on the ground that the makers of the notes at Dover were insolvent even at the time the notes were so given in account, though the fact was unknown to the plaintiff: it, therefore, did not come to the plaintiff's knowledge until after he received the notes, though still within a reasonable time for presentment: and the plaintiff, within a reasonable time after he thus knew of the fact, offered to return the notes. The defendants rejoin, that the plaintiff did not give them notice of the insolvency of these parties within a reasonable time: that is, they admit that the notice was in a reasonable time after the plaintiff became cognisant of the facts, but say that it was not given before the expiration of the time for presentment. I can see no reason for this being necessary. Suppose these notes had been sent to an agent at Dover for presentment at Dover, and the agent had gone there with a view to present them, and had found no one to receive them: this might have occurred on the last day on which presentment could be made, and too late to give notice to the defendants until that time had elapsed. On the *716] *whole, therefore, the replication sufficiently excuses the non-presentment. If, indeed, time had been suffered to elapse before the plaintiff gave notice of the facts to the defendants, the case would have been very different. By letting such time elapse, he would have rendered the notes his own; and the makers' insolvency would have made no difference. The limit of time as regards the notice is, not that it must be in time for presentment, but that it must be within a reasonable time after knowledge. And the notice having been given in this case within a reasonable time after knowledge distinguishes it from *Camidge* v. *Allenby*, 6 B. & C. 373, which was decided on the ground of laches; as is remarked by BAYLEY, B., in *Henderson* v. *Appleton*, Chitty on Bills, 356, 7, 9th ed., and in *Rogers* v. *Langford*, 1 Cr. & M. 687; see S. C. in 3 Tyr. 654.

In the fifth plea the statement is, that the plaintiff gave the defendants no notice of dishonour of the notes. The replication is like that to the fourth plea. This is demurred to; and one ground, among several, is, that there is not in this replication any sufficient statement of proceedings in bankruptcy. But I think the averments "became" and "continued" "bankrupts and insolvent" are sufficient for this purpose.

COLERIDGE, J., concurred.

ERLE, J. The declaration shows a good cause of action. The fourth plea gives a sufficient answer: that certain negotiable instruments were delivered by the defendants to the plaintiff on account of the debt; and the plea in effect shows a suspension of the right of action

*until the plaintiffs had presented the notes, and either received the money, in which case the right of action ended, or failed to do so, in which case it revived. It is to be remembered that these are negotiable instruments to which the defendants are no parties, and which pass from the defendants to the plaintiff without any indorsement by the defendants. The plea therefore is good on ordinary principles. The plaintiff replies, in effect, that the notes were of no value, and that this became known to him within the time for which his right of action was suspended; namely, that before the time for presentment elapsed, he found out that the makers were bankrupts; and then, within a reasonable time, although not within the time in which he was bound to present, he gave the defendants notice that they were valueless, and offered to return them. The defendants rely on the point that the form of presentment did not take place. I think that is immaterial: it might be otherwise had the defendants been the makers of the notes: but here I think the presentment is dispensed with by the allegation that the maker was bankrupt and insolvent. Therefore the replication shows the suspension taken off, and the right of action revived. Then it is rejoined, that no such notice as is alleged in the replication was given to the defendants within the time of presentment: and *Camidge* v. *Allenby*, 6 B. & C. 373, is relied on: but in that case each Judge puts the decision on the ground of laches, regarding, as it appears to me, presentment as unnecessary if there had been no laches; although that point was not there expressly decided. Here no laches is shown. [*717

Judgment for plaintiff.(*a*)

(*a*) Reported by H. Merivale, Esq.

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*DOE, on the several demises of HARRIS, BARNACLE and Others, *v.* SAMUEL TAYLOR. *June* 1. [*718

Devise (before stat. 7 W. 4 & 1 Vict. c. 26, s. 29) to my son A. T. for life, and "from and after the decease of my son A. T. then to the *first son* of my said son" A. T. "lawfully issuing, and, *for default of such first issue*, then to the use and behoof of the 2d, 3d, 4th and 5th, and all and every other son and sons, the heirs of his or their bodies lawfully issuing;" "and, for default of such issue, then," &c.

Held, that the first son of A. T. took an estate tail.

EJECTMENT for lands in the county of Gloucester. At the Gloucester Spring assizes, 1848, the cause came on to be tried before POLLOCK, C. B.; when a verdict was found for the plaintiff, subject to the opinion of this Court on a case.

The case stated that one John Taylor, at the time of making his will in 1794, to the time of his death in 1798, being seised in fee of the premises in question, duly made his will, by which, inter alia, he devised as follows: "I give, devise and bequeath all," &c. (describing the premises in question) "to my son Albright Taylor, for and during

the term of his natural life, so that he paying(a) all my just debts and funeral expenses, and legacies hereinafter mentioned, with and out of the real and personal estate, which I do hereby charge with the payment thereof, and from and after the decease of my son Albright Taylor, then to the *first son* of my said son Albright Taylor, lawfully issuing, *and, for default of such first issue*, then to the use and behoof of the second, third, fourth and fifth, and all and every other son and sons, the heirs of his or their bodies lawfully issuing, the elder to be always preferred, and to take before the younger of such sons, and the heirs of his body; and, for default of such issue, then to the use and behoof of all and every daughter of the body of my son Albright Taylor, and the heirs of the body of such daughter and daughters; and, for default of such issue, *then I give, devise and bequeath it to my son John Taylor during the term of his natural life, and after his decease to his first son lawfully issuing, and, for default of such issue, then to the use and behoof of the second, third, fourth, fifth and all and every other son and sons, the heirs of his or their bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons, and the heirs of his body; and, for default of such issue, then to the use and behoof of all and every daughter of the body of my son John Taylor, and the heirs of the body of such daughter and daughters, and, for default of such issue, then to remain to the right male heir for ever."

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The case then stated that John Taylor the son died in 1801, without having been married. That Albright Taylor died in 1809, leaving five children him surviving, and among them John Taylor, his eldest son, and Samuel Taylor the defendant. The said John Taylor, the grandson, attained his majority in 1821, suffered a recovery of the premises in question the following year, and died in 1841. The lessors of the plaintiff claim through the said John Taylor.

The question stated for the opinion of the Court was, whether John Taylor the grandson took an estate tail under the above devise. If the Court should be of opinion that he did, then the verdict entered for the plaintiff was to stand; if the Court should be of a contrary opinion, the verdict to be entered for the defendant.

Greaves, for the plaintiff, contended that the words "for default of such first issue" meant "for default of issue of such first son," and that John Taylor, the testator's grandson, took an estate tail. He relied particularly *on *Clements* v. *Paske*, 3 Doug. 384, where, under a devise "to the first and eldest son of the body of my nephew," J. C., "lawfully issuing or issued; and, for default of such issue, then, likewise, to the second, third, and every other son of my said nephew," J. C., "successively," it was held that an estate tail passed to the eldest son; on *Evans dem. Brooke* v. *Astley*, 3 Bur. 1570, *Doe dem. Bland-*

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(a) Sic.

(b) See *Slater* v. *Dangerfield*, 15 M. & W. 263, 275.

ford v. *Applin*, 4 T. R. 82,(*a*) and *Robinson* v. *Robinson*, 1 Bur. 38, cases of devise; and on *Owen* v. *Smyth*, 2 H. Bl. 594, and *Galley* v *Barrington*, 2 Bing. 387, cases of grant by deed. He cited also *Maynell* v. *Read*, Pollexf. 425,(*b*) *Spalding* v. *Spalding*, Cro. Car. 185, *Lomax* v. *Holmeden*, 3 P. Wms. 176, 178, *Doe dem. Orpe* v. *Frost*, 1 B. & C. 638, *Webb* v. *Hearing*, Cro. Jac. 415, *Goodright, lessee of Docking*, v. *Dunham*, 1 Doug. 264, *Doe dem. Gallini* v. *Gallini*, 5 B. & Ad. 621, 643,(*c*) which were cases of devise;(*d*) and *Doe dem. Willis* v. *Martin*, 4 T. R. 39, a case of grant by deed.

Keating, contrà. This very devise has been construed by Sir L. SHADWELL, V. C., who decided that John Taylor, the grandson, did not, by construction or by implication, take an estate tail, but that he took a life estate only; *Barnacle* v. *Nightingale*, 14 Sim. 456. The premises are devised "to the first son of my said son Albright Taylor." By these words the first son takes an estate *for life only, and there are no subsequent words to enlarge that estate; for the words [*721 "for default of such first issue" mean, "after the decease of such first son." The word "son" and "child" have each been held nomen collectivum; but "first son" cannot be so held. In *Doe dem. Burrin* v. *Charlton*, 1 Man. & G. 429, there was a devise to Samuel the father for life, and after his decease to his "eldest son," "but for want of such issue then to his daughter or daughters, share and share alike, for ever; but in case" Samuel "have no issue, then, to hold to him, his heirs and assigns, for ever." It was there contended that Samuel took an estate in tail male: but the Court held otherwise, on the ground that, as the "eldest son" was designated, the word "son" could not be taken indefinitely, and, therefore, the succeeding words "for want of *such* issue" did not imply an indefinite failure of issue. In *Denne dem. Briddon* v. *Page*, 11 East, 603,(*e*) there was a devise to "the use of all and every the daughter and daughters of the body of the said Thomas Nash on the body of the said Mary his wife begotten or to be begotten; and for default of such issue, to the right heirs of the said Thomas Nash for ever." Lord MANSFIELD, in his judgment, there observed: "If after the limitation to the daughters of T. N. the words had been 'and if they die *without issue*,' we would have implied an estate tail; but here the words are 'for default of *such issue*,' which can only mean the issue mentioned before." *Foster* v. *Lord Romney*, 11 East, 594, *Hay* v. *The Earl of Coventry*, 3 T. R. 83, and *Doe dem. Liversage* v. *Vaughan*, 5 B. & Ald. 464, are authorities to the *same effect. The terms of the original devise to the first son of A. T. give an estate for [*722

(*a*) See *Slater* v. *Dangerfield*, 15 M. & W. 263, 275.
(*b*) S. C., as *Holmes* v. *Meynel*, 2 (T.) Jones, 172.
(*c*) S. C. affirmed on error in Exch. Ch.; *Doe dem. Gallini* v. *Gallini*, 3 A. & E. 340.
(*d*) See *Lewis* v. *Puxley*, 16 M. & W. 733.
(*e*) Note (*b*) to *Foster* v. *Lord Romney*.

life only; and it is for the plaintiff to show that the estate, subsequently, is enlarged by other terms. The testator shows in subsequent parts of the will that he was conversant with the proper words for expressing an estate tail. [PATTESON, J. And also in a previous part that he knew how to denote the case of a "decease."] If the will is insensible the plaintiff must fail.

Greaves was heard in reply.

Lord DENMAN, C. J. This is a devise, by which we should have entertained no doubt whatever that an estate tail was given to John Taylor the grandson, if we had not been informed that the Vice Chancellor had expressed a different opinion. Undoubtedly, if that learned Judge had pronounced a deliberate judgment upon the whole matter, and after full discussion, we should have been much pressed by such an authority. But, considering the nature of the proceeding before him, that he was called upon to decree specific performance of an agreement to purchase the property devised, and that the application would be sufficiently answered if the title were even doubtful; that scarcely a single authority appears to have been cited; and that he offered to send a case for the opinion of a court of law; we may be justified, perhaps, in taking it that he intended rather to give his impression that the title was doubtful than to pronounce a final judgment on the proper construction of this devise. I certainly think we are bound to hold, with reference to the intention of the testator as manifesting itself upon the whole *instrument, that his grandson John took an estate tail. The case is like *Evans dem. Brooke* v. *Astley*, 3 Burr. 1570, and is almost identical with *Clements* v. *Paske*, 3 Doug. 384. I confess I think it may be dangerous to speculate, as Lord MANSFIELD appears to have done in those cases, whether any and what slips may have been made in copying. I think it better to construe a will as it is, and to assume that it is as it was intended to be. But, taking this will as it is, what is the meaning of "default of such first issue?" I think it cannot mean the death of Albright Taylor's first son. I think it clearly means general failure of issue of that first son; and that he took an estate tail.

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PATTESON, J. I confess I had no doubt on this question until I heard of the opinion expressed by the Vice Chancellor; and it should be remembered that few authorities were brought before him; so that we can hardly suppose him to have pronounced a deliberate judgment upon this devise. *Clements* v. *Paske*, 3 Doug. 384, is really the same as the present case: the word "likewise," to be sure, occurred in that case; but it was quite clear without it. I think the words "for default of such first issue" cannot mean anything else than "default of issue of such first son." It is admitted that an estate tail is given to all the other sons. The same phrase "for default of such issue" without the word "first" occurs after the limitations to the other sons. I think an estate tail is clearly given to John the grandson, and that there is no

accidental omission in the language of the limitation to him, but that the testator supposed he had used apt words for his purpose.

*COLERIDGE, J. I have not heard the whole of this argument: but, from what I have heard, there is certainly nothing but the opinion of the Vice Chancellor which would make me hesitate for a moment in coming to the conclusion that an estate tail passes by the devise in question. One can have no doubt that the actual intention was to give such an estate; but still it is necessary that there should be words expressive of that intention. I think there are such words. In *Evans dem. Brooke* v. *Astley*, 3 Burr. 1570, WILMOT, J., held the words "for want of such issue" to have the same effect, after a previous devise to "every son and sons," under circumstances very similar to the present. Taking the words of this will as they stand, it may be difficult to construe them quite literally. It appears to me that, after the devise to A. T.'s "first son," the testator designedly departed from the word "son," and took up the word "issue," and that by the words "default of such first issue" he meant to denote, and has denoted, failure of issue of that son of whom he had before spoken. [*724

ERLE, J. I am of the same opinion. The word "issue" ordinarily denotes a line of descendants; and, if we say that "first issue" means "first son," we must give a different meaning to the word "issue" in different parts of the same instrument. Judgment for plaintiff.(a)

(a) Reported by H. Davison, Esq.

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*MARGARET DAVIES *v.* WILLIAMS. *June* 3. [*725

In trespass for seduction of plaintiff's daughter, per quod servitium amisit, it appeared that the daughter had been seduced while out at service, and that she left her service in a state of pregnancy, and returned home, where she was supported by the plaintiff until and after her confinement.

Held that, as the implied relation of mistress and servant did not subsist between plaintiff and the daughter at the time of the seduction, the action was not maintainable.

TRESPASS. The declaration stated that defendant, on, &c., and on divers other days, &c., with force and arms assaulted, debauched and carnally knew one Susannah Davies, then and still being the daughter and servant of the plaintiff; whereby the said daughter and servant of plaintiff then became pregnant and sick with child, and so continued for a long time, &c., and at the expiration thereof, to wit, on, &c., and before the commencement of this suit, was delivered of the child with which she was so pregnant as aforesaid. By means of which several premises the plaintiff's said daughter and servant for a long time, to wit, from the day and year first aforesaid to the time of the commencement of this suit, became and remained unable to perform the necessary affairs and business of the plaintiff, so being her mother and mistress as aforesaid: &c., &c.

Pleas: 1. Not Guilty.

2. That the said Susannah Davies was not, at the said times when, &c., or any of them, the servant of the plaintiff, modo et formâ.

Issues thereon.

On the trial, before Lord DENMAN, C. J., at the Carnarvonshire Spring assizes, 1846, it appeared that the plaintiff's daughter became with child by the defendant, while she was in his service, in November, 1845, and that she left him in consequence of her pregnancy, and *went home to the plaintiff, who maintained her until her confinement and for some weeks afterwards.

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It was objected that, as the daughter was not in the plaintiff's service at the time of the seduction, trespass would not lie. His Lordship directed a nonsuit, and gave leave to move to enter a verdict for the plaintiff.

Townsend, in Easter term following, obtained a rule nisi accordingly.

Welsby now showed cause. It is clear, both upon principle and authority, that this action cannot be maintained. The daughter was not the servant of the plaintiff at the time of the trespass. The trespass complained of is, for the purposes of the present question, like an ordinary assault; and, if a daughter suffer while in her father's service in consequence of such an assault previously committed on her while she was in the service of another person, the father cannot maintain trespass. *Postlethwaite* v. *Parkes*, 3 Burr. 1878, is a direct authority, if it can be considered as a decision: the case was compromised; but it appears from the report that the Court were all of opinion that the action could not be maintained; and the case is recognised by BULLER, J., in *Bennett* v. *Allcott*, 2 T. R. 166. In the last mentioned case it is laid down that an action for mere seduction and loss of service must be an action on the case, and that trespass cannot be maintained unless the seduction is accompanied by an illegal entry of the master's house.(a) In *Blaymire* v. *Hayley*, 6 M. & W. 55, and *Dean* v. *Peel*, 5 East, 45, it was *held that even case could not be maintained by a father for the seduction of his daughter, while she was in the service of another person. In some instances in which the daughter at the time of seduction was not living with the parent, an attempt has been made to evade the difficulty by substituting another gravamen for the loss of service. Thus in *Harris* v. *Butler*, 2 M. & W. 539, where the plaintiff's daughter was apprenticed to the defendant's wife for the purpose of learning the business of a milliner, the declaration alleged that in consequence of the defendant's misconduct the daughter became ill and incapable of serving, &c., and learning the business. So in *Grinnell* v. *Wells*, 7 M. & G. 1033, the declaration, instead of alleging a loss of service, alleged that the daughter was a poor person maintaining herself by her labour, and that her seduction rendered it necessary for her father (the

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(a) See *Newton* v. *Holford*, 6 Q. B. 921.

plaintiff) to support her. These attempts to substitute some other gravamen for the loss of service were both made in actions on the case, and yet they were unsuccessful.

Townsend and *E. Beavan*, contrà. This is in effect an action on the case. "The sole foundation of the action is the loss of service:" per MANSFIELD, C. J., in *Woodward* v. *Walton*, 2 New Rep. 476, 482; 2 Chitty on Pleading, 484, note (*k*), (7th ed.) The defendant's act had an injurious tendency to the plaintiff: and the actual injury, viz., the loss of service, consequential upon his act, occurred when the daughter was living with the plaintiff, her mother; for the mother had a right to her daughter's *service at that time. [COLERIDGE, J. How does it appear that any service would have been rendered if the seduction had not taken place?] It does not appear affirmatively; but the contrary does not appear as it did in *Dean* v. *Peel*, 5 East, 45, where it was found that at the time of seduction there was on the part of the daughter no animus revertendi to the father's house. [COLERIDGE, J. The affirmative is on the plaintiff.] The material time is the time when the loss of service actually accrued: and at that time the daughter had returned home. [*728

Lord DENMAN, C. J. I retain the opinion I had at the trial. The cases decided upon this subject by the Court of Exchequer are conclusive.

PATTESON, J. The loss of service consequent upon the defendant's wrongful act is the gist of the action. To support such an action the defendant's act must have been wrongful to the plaintiff. How is the seduction wrongful to the plaintiff, unless the relation of master and servant subsist at the time of the seduction? If that relation is contracted subsequently, how can it give a right to sue in respect of an act done before the relation subsisted? If this action may be maintained, such an action may be maintained by any ordinary master whose servant enters his service in a state of pregnancy consequent upon her seduction before entering his service.

COLERIDGE, J. If the loss of service is the foundation of the action, it is clear that the relation of *master and servant between the plaintiff and the person seduced must subsist at the time of seduction; for otherwise the defendant's act does not deprive the plaintiff of anything belonging to him. Where such relation is contracted after the seduction, the state of the case is, that the master employs a servant who is less valuable by reason of an antecedent occurrence: there is no consequential injury of which he can complain. [*729

ERLE, J. I am of the same opinion. There was no vested right in the plaintiff to the daughter's service at the time when the wrongful act was committed. Rule discharged.(*a*)

(*a*) See *Eager* v. *Grimwood*, 1 Exch. 61.

Reported by H. Davison, Esq.

*730] *KINNING'S Case. *June* 3.

Under stat. 8 & 9 Vict. c. 127, s. 1, which enacts that a debtor, against whom a judgment of debt has been obtained, may be summoned before any one of certain inferior courts, and that, if he appears to have the means of paying by instalments, and shall not pay at such times as the Court shall order, the judge may order him to be committed for any time not exceeding forty days:

Held, by Lord DENMAN, C. J., and ERLE, J., that, on default in paying an instalment, the debtor may be committed at once, without summons to show cause.

By PATTESON and COLERIDGE, Js., that such previous summons is necessary.

By stat. 8 & 9 Vict. c. 127, s. 1, a debtor, against whom judgment has been obtained, may be summoned before the inferior court within the jurisdiction of which he shall reside or be, and, if he appear to have the means of paying, and shall not pay, his debt at the time ordered by the Court, he may be committed to the gaol of the district in which he "shall be resident."

Held, by Lord DENMAN, C. J., COLERIDGE and ERLE, Js., that the commitment must be to the gaol of the district in which the debtor resided at the time when he was summoned.

By PATTESON, J., that the commitment must be to the gaol of the district in which he resides at the time of commitment.

A warrant of commitment under stat. 8 & 9 Vict. c. 127, s. 1, recited that K. "of Fleet Lane, Farringdon Street, in the city of London," and "then being at Fleet Lane in the city aforesaid," had been summoned touching the non-payment of a debt for which judgment had been previously recovered against him, and, on appearance, had been ordered to pay by instalments, and had made default in so paying; the warrant then ordered his commitment to a gaol of the city of London, being the city in which "the said" K. "hath been resident."

Held, by Lord DENMAN, C. J., and ERLE, J., and *semble*, per COLERIDGE, J., that it appeared from the warrant that the debtor was resident in the city of London at the time of commitment.

Held, by PATTESON, J., that it did not so appear.

THOMAS KINNING was brought up by a habeas corpus ad subjiciendum, &c., directed to the keeper of the Debtors' prison for London and Middlesex, in the city of London.

The return made by the keeper to the writ certified that the prisoner had been brought into the custody of the said keeper, on the 27th of April last, and had been from that time detained in his custody, under the following warrant.

"London, to wit.

"In the Sheriffs' Court, London, Poultry Compter, an inferior court of record for the recovery of debts.

*731] *"At a Court held, the 4th day of February, 1847, at the Guildhall of the city of London, and within the jurisdiction of the Court.

"Whereas Thomas Kinning, of Fleet Lane, Farringdon Street, in the city of London, on the 7th day of December last, being indebted to William Townley, of 8, Little James Street, Gray's Inn Lane, in the county of Middlesex, in a sum not exceeding 20*l.*, besides costs of suit, that is to say in the sum of 19*l.* 19*s.*, besides 3*l.* 12*s.* 6*d.* costs of suit, by force of the judgment hereinafter mentioned, and *then being at Fleet Lane* in the city aforesaid, and within the jurisdiction of this Court, was duly summoned to appear on the 12th day of December last, at this Court, to answer such questions as might be put to him touching the not

having paid to the said William Townley the sum of money recovered in a certain judgment of this Court on the 5th day of December, 1846, and the said Thomas Kinning having appeared before me at the time and place aforesaid, and, it thereupon then appearing to me, by the admission of the said T. K., that the said T. K. had the means of paying the said debt and costs aforesaid in manner hereinafter mentioned, I did then and there order that the said T. K. should pay the said debt and costs aforesaid to the said William Townley in manner following: that is to say, the sum of 2*l.*, part thereof, on the 12th day of January then next, and the residue thereof by instalments of 2*l.* on the twelfth day of every subsequent month, until the whole of the said debt and costs were fully paid: And whereas it has this day at this Court been duly proved before me that the said T. K. has not paid 2*l.*, the amount of the first *instalment, as directed by the said order, although the time for the payment thereof has elapsed, and the same has been duly [*732 demanded of the said T. K., and the said T. K. has been personally served with a copy of the said order, and the original order was at the same time shown to him, but that 2*l.*, being the amount of the said first instalment, is still due, owing and unpaid to the said William Townley, contrary to the tenor and effect of the said order: These are therefore to will, require and authorise you, immediately upon the receipt hereof, or so soon after as may be, to take into your custody the body of the said T. K. and him safely convey to Her Majesty's Debtors' Prison for London and Middlesex, in the city of London, being the common gaol wherein the debtors under judgment and in execution of the superior Courts of justice may be confined within the city of London, *being the city in which the said Thomas Kinning hath been resident*, and there to deliver him to the keeper of the said prison, who is hereby required and authorised to receive the said T. K. into his custody, and him safely to keep and detain in the said prison for the space of forty days from the time of his arrest under this warrant, or until he shall be discharged out of custody by leave of me. And for so doing this shall be your sufficient warrant.

"Given under my hand and seal at the said Court held at the Guildhall aforesaid, this fourth day of February, 1847.

"EDWARD BULLOCK,
"Barrister at Law and Judge of the said Court."

"To Lloyd Simpson, Serjeant at Mace, and to Thomas Burdon, Keeper of the Debtors' Prison aforesaid, or his deputy there."

Pashley now moved that the prisoner should be discharged. [*733 The objections to this return arise on sect. 1 of stat. 8 & 9 Vict. c. 127,(a) intituled, "An act for the *better securing the payment of small debts." [*734 The first objection is that the order for

(a) Stat. 8 & 9 Vict. c. 127, s. 1, enacts: "That if any person is or shall be indebted to any other in a sum not exceeding 20*l.* besides costs of suit, by force of any judgment obtained, or

the debtor's imprisonment appears to have been pronounced in his absence; and the second that it directs imprisonment in the gaol of a city within which it does not appear that the debtor was resident at the time of commitment.

First. The order is in pœnam: and it is illegal to sentence a man to punishment without a hearing; *Regina* v. *Templeman*, 1 Salk. 55; *Rex* v. *Geary*, 1 Show. 131; *Bateomb's Case*, 3 Mod. 265;(*a*) *Regina* v. *Simpson*, 10 Mod. 248. The same principle protects a man's franchise; *Bagg's Case*, 11 Rep. 93 *b*, 99 *a*; and his goods against a statutory

of any order for the payment thereof or of any costs in any Court, which judgment or order shall have been obtained from any Court of competent jurisdiction in England, it shall be lawful for the creditor so having obtained a judgment or order to obtain a *summons* from any Commissioner of the Court of Bankruptcy for the district in which such debtor *shall reside or be*, or from any Court of Requests or Conscience, or inferior Court of Record for the recovery of debts, or other court for the recovery of small debts, within the jurisdiction of which such debtor *shall reside or be*, having a Judge who shall be either a barrister at law, special pleader, or an attorney who shall have practised as an attorney for not less than ten years," &c., "which summons such Commissioner of the Court of Bankruptcy or such Court shall be authorised and required to grant, according to the form in schedule (A) hereunto annexed, upon the application of such creditor by any petition or note in writing, according to the form in schedule (B) hereunto annexed; and the debtor, appearing before such Commissioner or Court at the time to be appointed in such summons, shall be examined by the said Commissioner or Court, and shall, if the creditor think fit, be interrogated before such Commissioner or Court by the creditor summoning him, touching the manner and time of his contracting his debt, the means or prospect of payment he then had, the property or means of payment he still hath or may have, the disposal he may have made of any property since contracting such debt; and such creditor shall also, if such Commissioner or Court shall think fit, be examined by the said Commissioner or Court touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated before such Commissioner or Court by the said debtor touching the said claim against him; and it shall be lawful for such Commissioner or Court to make an order on the said debtor for the payment of his debt by instalments or otherwise; and in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall if attending refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the Commissioner or Court, or shall appear to such Commissioner or Court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, *or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same* at such times as the Commissioner or Court shall order, or as the Court shall have ordered in which the original judgment shall have been obtained or order made, then in any of the said cases it shall be lawful for such Commissioner or the Judge of such Court to order such debtor to be committed, for any time not exceeding forty days, to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough, *or place in which such debtor shall be resident*, or to any other gaol or debtors' prison within the same county, city, borough, or place which shall by any declaration of one of Her Majesty's Principal Secretaries of State be allowed as a place of imprisonment under this act, so long as such declaration shall remain in force and unrevoked."

By sect. 3 it is "declared and enacted, that no imprisonment under this act shall in any wise operate as satisfaction or extinguishment of any debt or demand; but any person imprisoned under this act, who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the order of imprisonment being made, and all subsequent costs, shall, upon entry of such payment indorsed on the order of imprisonment, signed by the plaintiff or his attorney, be discharged out of custody by leave of a Commissioner or Judge of the Court in which the order of imprisonment was made."

For the material part of sect. 22, see pp. 741, 743, post.

(*a*) Reported as *Anonymous* in Leach's (5th) ed. 1793.

distress; *Rex* v. *Benn*, 6 T. R. 198; *Rex* v. *Hughes*, 3 A. & E. 425; *Painter* v. *Liverpool Gas* *Company, 3 A. & E. 433. [PATTESON, J. Is this proceeding by way of punishment? By sect. 3 [*785 it is provided that upon payment of his debt the debtor shall by leave of the Judge be discharged out of custody. Imprisonment in execution of judgments for small debts had been recently done away with. Probably the change was thought inexpedient in some measure; and this act was intended as a partial restoration of the old law.] Under a conviction, a party is commonly discharged on payment of the fine adjudged; yet the judgment is in pœnam: and the 3d section of this act expressly provides that "no imprisonment under this act shall in any wise operate as satisfaction or extinguishment of any debt or demand." [PATTESON, J. That may be because the imprisonment is for a limited time only. I had recently to consider the 1st section in a case argued before me at chambers by Mr. *Maynard*. One of the Queen's servants had been summoned before the Bankruptcy Court. He did not appear to the summons; and that Court pronounced him to be in contempt, and committed him. He was brought before me by habeas corpus; I thought the process prescribed by the act was by way of execution and not of punishment, and discharged him.] The commitment is discretionary, and is a judicial act; no one should suffer prejudice from such an act before he has been heard. [COLERIDGE, J. Must not it be taken that the debtor had the means of paying by instalments at the time of making the order that he should so pay?] If he had then had present means of paying the whole debt at once, the order would have been that he should pay the *whole at once; but the order being in terms [*736 for payments in future, it could not be certain that he would have the means at the required periods; and he has had no opportunity of showing that his default has been the unavoidable effect of sickness, misfortune, or any other circumstance which might induce the Court to think him undeserving of commitment.

Secondly. The statute authorises the commitment to the gaol "of the city, borough, or place in which such debtor shall be resident." By the previous part of the 1st section the summons may be obtained from any Court, within the jurisdiction of which the debtor shall "reside or be;" but the alternative "be" is dropped in the provision relative to the place of imprisonment. Even if the description "of Fleet Lane" imports, according to *Regina* v. *Toke*, 8 A. & E. 227, that he was there resident at the time of summons, still the continued residence there at the time of commitment should have been averred, by analogy to the principle acted upon in *Regina* v. *Tordoft*, 5 Q. B. 933, 940; whereas it is merely averred that he "hath been resident" in the district, a phrase which rather imports cessation of residence. The legislature probably intended, for the debtor's benefit, that he should be imprisoned in the district where he would be most likely to have friends.

Petersdorff, contrà. The warrant is not in pœnam; and no summons was necessary before commitment. In *Ex parte Foulkes*, 15 M. & W. 612, where a debtor was committed for not appearing to a summons
*737] under the section in *question, ALDERSON, B., observed in his judgment that "the intention of the legislature was to give a limited ca. sa., in all cases where the amount of the judgment debt did not exceed 20*l*." [COLERIDGE, J. The imprisonment may be for any term not exceeding forty days; within that limit the Judge has a discretion: how is he to exercise it without knowing all the circumstances of the case? The debtor may have a clear excuse; he may have obtained time from his creditor.] In most cases the summons would operate merely as a notice to the debtor to abscond: and in the case supposed, and probably in every case, the creditor would be able to give all necessary information. [ERLE, J. May not the process be a sort of suspended execution? The Judge ascertains, as well as he can, all the circumstances, both actual and probable, in the first instance when he gives the order to pay by instalments; and then, when default is made in paying such instalments, he acts on his previous knowledge, and issues his warrant of commitment accordingly. COLERIDGE, J. The default may be as to the last of twenty monthly instalments, when the circumstances of the case have become entirely changed.]

Secondly. The word "of," as applied to a place, has been held to show residence there; *Yardley* v. *Jones*, 4 Dowl. P. C. 45: and the continued residence at the time of commitment is averred sufficiently.

Pashley replied.

Lord DENMAN, C. J. With very great doubt and embarrassment I have come to the conclusion that jurisdiction sufficiently appears upon
*738] this warrant. I *think the residence intended at the time of commitment is the same residence which gave the Court original jurisdiction, and that there is a sufficient averment of such residence.

On the other point I must express my regret that provisions affecting the liberty of the subject should be so framed as to make it very difficult to ascertain their meaning. I am of opinion, however, that the award of commitment is not a judicial proceeding at all; if it were so, I should be bound to hold that the party to be affected by it should be first summoned and heard. I think the power to inquire and determine is to be completely exercised in the first instance when the order is made for payment by instalments. I agree with my brother ALDERSON that the commitment is a limited ca. sa., the term of imprisonment being subject to reduction if the Judge, on subsequent information, should think fit to interpose. I am quite aware of the importance of so construing a statute as not to infringe on liberty. But in cases of this kind I apprehend even a greater evil on the other side in the enormous multiplication of petty process, rendering the aid of an attorney necessary at every turn of every trifling cause, and letting in the danger of endless vex-

tion and expense. I think the intention was that the Judge, who makes the order for payment by instalments, should then determine judicially whether, in case of default, a limited ca. sa., under which the debtor may be imprisoned for forty days, should issue. All judicial proceeding, in my opinion, ends there: the execution becomes in force as soon as default is made; and any reduction in the term of imprisonment is a mere matter of indulgence.

*PATTESON, J. I am sorry that I cannot agree with my Lord on either point. The act is, undoubtedly, very difficult to construe: but I think the debtor should be summoned and heard before he is committed; and that the residence averred in the warrant is insufficient. [*739

I do not quite like the phrase "limited ca. sa.;" though in the case before me at chambers I expressed an opinion that the process in question was in the nature of a ca. sa., and was not process for contempt. The 1st section provides that a person against whom judgment for a debt not exceeding 20*l.* has been obtained may be summoned before certain courts for the district in which he shall reside or be. If he does not attend as required by the summons, he may be committed for forty days. If he does attend, then an examination is had before the judge, and the judge may make "an order on the said debt or for the payment of his debt by instalments or otherwise." One would have thought that the words, "if he appears to have the means of paying by instalments or otherwise," would be introduced here; but they are not; they come afterwards. The section then goes on to say: if the debtor shall appear "to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or if he appears to have the means of paying the same by instalments or otherwise, *and* shall not pay the same at such times as the commissioner or Court shall order," then it shall be lawful for the Court to order him to be committed for any time not exceeding forty days. The words as to the means of paying are introduced here for the first time; so that the times of the order for *payment and of the breach are improperly jumbled together; for, if the order is to pay by instalments, and not the whole at once, the breach must occur at a distinct and subsequent period. At the time of attendance on this summons, the actual means of paying an instalment, of course, cannot appear: and a long interval may elapse between the order and default; so that even the probable means of paying may be matter of great uncertainty. During this interval circumstances may occur which would much influence the discretion of the judge in exercising his power of commitment. The act does not provide in what manner the judge is to inform himself of such circumstances. But it is clear that his discretion ought to be guided by the circumstances brought to his notice at [*740

the time he is called upon to exercise the power. It must be taken in such a case that the debtor is free from all imputation of fraud; for, if he is not, the judge would scarcely order him to pay by instalments; he might either order him to pay the whole at once, or commit him for the fraud forthwith. It is said the judge may get his information from the creditor. But the creditor will often know nothing, except that the debt is not paid; and the debtor ought to have an opportunity of showing, if he can, that the debt is paid, or, that circumstances extenuate the non-payment. In such a case I do not think justice can be done unless the debtor is heard and all the circumstances made known. In this part of the act there seems to be an imperfection which I think we are bound to prevent from operating injuriously.

With respect to the averment of residence, I do not think it sufficient; but, if that were the only point, I should have hesitated to differ from the rest of the *Court. The section says that a summons may be obtained from the Court "within the jurisdiction of which such debtor shall reside or be;" and, afterwards, that he may be committed to the gaol wherein the debtors under judgment and execution may be confined within the city or place "in which such debtor shall be resident." In the latter passage nothing is said about the jurisdiction of the Court from which the summons issued. There may be this reason for the change of language, that between summons and commitment there may be a long interval, during which the debtor may have changed his residence. And the 22d section shows that the commitment may be to a place out of the judge's jurisdiction; for it provides that, where a Court shall have made an order for a debtor's commitment, and he shall be out of the jurisdiction of such Court, the officer charged with the warrant may get it backed by a magistrate of the county in which the debtor then is, and take the debtor in the foreign county. The drawer of the 1st section appears to have forgotten that it applies to two classes of commitment; the one for non-attendance on the summons mentioned, in which case the debtor would probably be resident in the same place as when the summons issued, the other for subsequent defaults, in which case there is more likely to be a change of residence: for the same direction is given as to both classes: namely, that the debtor is to be confined within the county or district in which he "shall be resident." I think that means the residence at the time of commitment, and that this warrant does not show the debtor to have been then resident in that district to the gaol of which he was committed.

*741]

*742] I think this warrant bad on both grounds: but I give *my opinion with great diffidence, especially on the last ground; for on that I have the misfortune to differ from all the rest of the Court.

COLERIDGE, J. As there is a difference of opinion in the Court upon both points, it would be presumption in me to say that I entertain a decided opinion on either; but, after giving them my best consideration,

I think that the warrant is sufficient as to the residence, and that it is insufficient for not averring a summons before commitment.

As to the first point, we must remember that we are dealing with Courts of limited local jurisdiction, the proceedings in which must in some cases extend over a considerable period, so that the framers of the act might well have anticipated that questions of jurisdiction would be likely to arise upon change of the debtor's residence. The 1st section requires, in order to found proceedings against a judgment debtor, that a summons to him must issue from the Court within the jurisdiction of which he shall "reside or be;" and I think that the commitment also must be to the gaol of the district in which he resided when the summons was issued. In the first instance, the summons may proceed from the Court of the district in which the debtor "shall reside or be." Here the language is different from that which is used with respect to the place of commitment; you may get a summons against a debtor from the Court of any district in which he is found; but the commitment must be to the gaol of the place in which he "shall be resident." The section does not, certainly, say "resident as aforesaid;" if it did, there could be no doubt that the residence intended would be *the residence at the time of summons: still I think it should be construed as if it said so, not only for the sake of convenience, [*743 but because express authority would be requisite to enable these local Courts to commit to a gaol out of their jurisdiction. The 22d section throws light on this: for it provides for the case of a debtor being out of the jurisdiction of the Court in which a judgment or warrant shall have been obtained against him. Now what is that provision? It is that the officer of the Court may get the warrant indorsed by a magistrate of the foreign district and take the debtor there. If the judge of the Court from which the warrant issued had power given him by the 1st section to commit to the gaol of the foreign district, why should he have to call in the magistrate's aid under the 22d section? The gaoler of the foreign district, it is to be observed, is not required to receive the debtor into his custody; the provision is simply that the officer may get the warrant indorsed, and "all constables and other peace officers shall be aiding and assisting within their respective districts in the execution of the said warrants," &c. Therefore, my understanding of the matter is, that the officer, having got his warrant backed, is to execute it by taking the debtor back to the gaol of the original jurisdiction. If that is the right view, this warrant is clearly sufficient as to the averment of the debtor's residence.

There is also another mode of arriving at the same conclusion: namely, that the words "hath been resident" import a continuing residence up to the time of commitment: and certainly the expression "hath been," as used in the warrant, is not necessarily exclusive of *present time. But I do not found my judgment on this last ground. [*744

The other point, as to the necessity of a summons before commitment, I wish to decide on the general principle that, before a judicial act is done, both sides must be heard. Is then this order of commitment a judicial act? It appears that judgment for a debt was obtained against Kinning, and that afterwards at another Court he was summoned to answer such questions as might be put to him touching the non-payment of the debt and costs, amounting together to about 24*l.*, and that, upon its appearing to that Court that he had the means of paying by instalments, an order was made that he should so pay after the rate of 2*l.* a month. Now it may well be in such cases that the instalments are made payable during a period of twenty months; and this is likely enough to happen where the debt amounts to 20*l.* At the commencement of this period, the Court finds that the debtor can pay 1*l.* a month. I will suppose default to be made in the twentieth month. What is to be done then? The act does not then, as it appears to me, direct that a sort of suspended capias shall then issue, but says plainly enough that it shall be lawful for the judge to order the debtor to be committed for any time not exceeding forty days. The debtor might be able to show, if he had an opportunity of doing so, that it was from no fault of his own that he had failed to pay the last instalment; or that his creditor had forgiven it; or that, in truth, he had actually paid it. How are such circumstances to be ascertained? Should they not be inquired into, for the purpose of determining whether the debtor ought to be committed at all, and, if committed, for what time? *Mr. *Petersdorff* seems to admit that the circumstances should be ascertained; but he says the judge may get his information from the creditor. Now I cannot think such information ought to be obtained ex parte. An ex parte statement often appears to be beyond all possible doubt; then the other side is heard, and the truth is clear the other way. Undoubtedly, frequent investigations of this kind in trifling causes may produce inconvenience and expense. That is an evil; but I think, notwithstanding, it is our duty to take care that the principles we proceed on are principles of justice; and, if any great inconvenience should ensue from their application, we must leave it to the legislature to provide a fitting remedy. Until I find something more than the silence of the legislature on a matter of this kind, I can hardly suppose it was intended to set aside these principles.

*745]

ERLE, J. It is with much diffidence that I pronounce judgment in this case: but, after giving my best attention to it, I have come to the conclusion that this warrant is valid.

As to the first objection, the warrant seems to run thus: "You, the debtor, were resident in the city of London, when you were summoned; and I took you to the gaol of the city of London where you have been resident." The residence stated appears to me a continuous fact. I think the warrant may be supported on that ground. But, if it is neces

sary to construe the statute, I think the judge may commit the debtor to the prison of the district in which he resided at the commencement of the proceedings.

The second objection to the warrant is one of *substance, that the debtor has been committed without opportunity of showing cause why he should not be committed. On the best consideration I can apply to this question, I think the judge had authority so to commit. The judge has power of commitment in several cases; and one of them is, if the debtor appear to have the means of paying by instalments, and do not pay the same at such times as the Court shall order. The act, in terms, therefore, requires one summons only. The warrant shows that the debtor appeared to have the means of paying by instalments, and that he did not pay them at the time he was ordered to pay. It is said to be harsh to send a man to prison without giving him an opportunity of showing cause. But the inconvenience of requiring notice to be given to the debtor before commitment is obvious. Suppose he is about to abscond with his property; if a summons is necessary before capias, the capias would be futile. I think also the appearance of harshness becomes much less, if the history of recent legislation in these matters is referred to. It is but a very short time since a man might be taken in execution for a debt of any amount. Then an act was passed, which abrogated this sort of execution for debts not exceeding 20*l*. This state of things was supposed to be too favourable to debtors; and then came this act which is a partial restoration of the old law with certain modifications. Under this act as I understand it, inquiries are first made whether the debtor can pay by instalments; if the judge is satisfied that he can so pay, an order is made to pay accordingly, with power to commit in case of default. It is as if, at the time when the order to pay is made, a capias were taken *out, to be suspended till default, and then to be put in force. But the procedure is not even so harsh as that: for, on default, the creditor cannot sue out the capias himself. He must go to the judge, and satisfy him that the case is a proper one for imprisonment. The commitment cannot exceed forty days; and the debtor, if he have a grievance, may make it known to the judge, and obtain his discharge at any time. This is the conclusion to which I have thought it my duty to come. The subject is one of very great importance, as I believe the County Courts act contains a similar provision.(*a*) Prisoner remanded.(*b*)

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[*747

(*a*) See stat. 9 & 10 Vict. c. 95, s. 99.

(*b*) The prisoner was brought up before the Court of Common Pleas on the day following this argument, and was discharged on the ground that hearing was necessary before commitment: Ex parte Kinning, 4 Com. B. 507.

Reported by H. Davison, Esq.

The QUEEN v. GRIMSHAW. *June* 5.

Quare, whether a coroner in a borough under stat. 5 & 6 W. 4, c. 76, can regularly be (by sect. 62) appointed before the grant of a Court of Quarter Sessions has passed the great seal, though within ten days after Her Majesty's pleasure to make the grant has been notified to the council:

But, a coroner having acted under such appointment, and been recognised in his office by the council for several years, *Held*, that the office was full, and that an information in the nature of a quo warranto lay to oust a subsequently appointed coroner.

A coroner cannot be elected at a meeting of the council held by adjournment from a quarterly meeting, no summons or notice having been previously served upon the members of the council, stating that such business was to be transacted.

Semble, that a coroner in a borough is not within the provisions of stat. 32 G. 3, c. 58, s. 1.

INFORMATION in the nature of a quo warranto for executing the office of coroner for the borough of Wigan. Several issues of fact were raised on traversing the return:(*a*) and the cause was tri·d at *the
*748] Liverpool Spring assizes, 1846, when a special verdict was found; the material parts of which are as follows.

Wigan is a borough named in sect. 1 of schedule (A) of stat 5 & 6 W. 4, c. 76. Before that act, the mayor for the time being exercised the office of coroner for the borough, under the original charter of incorporation. The town council having petitioned for a separate court of quarter sessions, a warrant was issued for that purpose under the sign manual, dated 23d February, 1846. The verdict then stated notice by letter, transmitted, April 30th, 1836, from the Home Office to the town clerk of Her Majesty's grant "that a separate court of quarter sessions shall be henceforward holden" in and for the borough; which letter was by him laid before the council, and entered on their minutes; also a meeting of the council, 7th May, 1836, at which an election for the office of coroner took place, and Mr. Rogerson was declared to be elected; and that he took the oath of office, &c.

On 10th June, 1836, the grant of quarter sessions passed the great seal, and the seals of the Duchy and County Palatine of Lancaster: and such grant was duly signified to the council, and accepted by them on 2d July following. On 14th June, 1836, Mr. Rogerson held an inquest as coroner within the borough. And he continued actually to exercise the office of coroner, without dispute, and held inquests in the borough, and was repeatedly recognised and treated as coroner by the council, up to November, 1842: but there was no appointment of him under the seal of the borough, nor otherwise than by the entry of the above proceedings on the minutes of the Council.

*A quarterly meeting of the council of Wigan was duly held
*749] on 9th November, 1842, for the transaction of the general business of the said borough; at which meeting the mayor for the ensuing year was elected, and other general business transacted, as set out in the

(*a*) The substance of these will appear sufficiently by the conclusion of the verdict, p. 750 post.

verdict. The meeting was adjourned, in pursuance of a resolution then passed to that effect, to the 16th November following. On that day a meeting was accordingly holden by adjournment, at which, among other matters, it was resolved that Rogerson should be removed from the office of coroner for the borough, and Grimshaw should be appointed in his room; and that the town clerk should be directed to prepare a formal appointment of Grimshaw as coroner. A minute of these proceedings was duly entered in the books of the council. But it was not found by the verdict that no other business than that entered on the minutes was then transacted. The meeting was further adjourned to 30th November; when a formal appointment of Grimshaw as coroner was sealed with the corporation seal.

No summons was issued to the members of the Council for the meeting holden on 16th November, nor notice of it given, except the said resolution at the preceding meeting from which the same was adjourned, and a notice or summons, signed by the town clerk, and delivered to each member of the Council three days before the meeting, in the following form.

"Town Clerk's Office, Wigan ——— 1842.

"Sir. I beg leave to inform you that a meeting of the council of the borough of Wigan will take place at the New Town Hall on —— the 16th November, precisely at —— in the afternoon, and that your *attendance is particularly requested. I am, Sir, your obedient servant. ——— Town Clerk." [*750

There was, therefore, in the notice no specification of the business proposed to be transacted at the meeting. No notice was given to Rogerson of the adjourned meeting, nor of the intended proceedings for his removal: nor was he present at either of the meetings. After 16th November, 1842, Rogerson continued to act as coroner, as previously: and after 30th November he also acted as coroner, and held inquests and received fees in the borough.

"But whether or not, upon the whole matter aforesaid, the said office of coroner of the said borough of Wigan was or was not vacant in manner and form as the said J. Grimshaw hath in his said plea alleged: and whether the said meeting of the said council of the said borough in the said plea first above mentioned" (9th November) "was or was not duly convened, assembled or held, in manner and form," &c.: "and whether the said meeting of the said council of the said borough mentioned in the said plea as being holden by adjournment was or was not duly holden or assembled in manner and form," &c.: "and whether the said council of the said borough did or did not duly elect or appoint the said J. G. to the said office of coroner, or to be coroner of the said borough, in manner and form," &c., "the jurors aforesaid are altogether ignorant," &c.

Martin, for the Crown. The first and most important question is,

whether the office of coroner was vacant when Grimshaw was appointed to it. It is a freehold office; the tenure being quamdiù se bene gesserit,
*751] *by stat. 5 & 6 W. 4, c. 76, s. 62. And there is no rule by virtue of which such an appointment must be made under seal. A mere appointment need not be by deed; *Saunders* v. *Owen*, 2 Salk. 467, Com. Dig. *Justices of Peace* (D 5): and, though a corporation can only act by deed, this is an appointment of the council, and no corporate act. The entry on the minutes is in fact the appointment, as in the case of the treasurer and other officers, appointed under sect. 58. Any other construction would tend to defeat the object of stat. 32 G. 3, c. 58. It is, however, objected that this appointment, assuming it to be made by entry, was not made "within ten days next after the grant of the said Court was signified to the council" according to the provision of sect. 62 of stat. 5 & 6 W. 4, c. 76, but before the grant had even passed the Great Seal. But, supposing it to be no regular appointment in this respect, it was recognised from day to day afterwards, Rogerson holding inquests and receiving the fees: the office was full de facto; *Regina* v. *The Councillors of Derby*, 7 A. & E. 419; *Rex* v. *The Mayor, &c. of Winchester*, 7 A. & E. 215; 5 Bac. Ab. 261 (7th ed.), tit. *Mandamus* (C), 1. The filling of an office is something analogous to the possession of land: regular proceedings must be taken to oust the intruder, if he be such. And the coroner is an officer within stat. 6 & 7 Vict. c. 89, s. 1, whose "election" cannot be called in question after twelve months. He is also protected by stat. 32 G. 3, c. 58; which indeed applies in words only to proceedings by quo warranto, but where it was clearly the intention of the legislature that enjoyment of a corporate office for the statutory
*752] term should secure *the possession of it; as Lord TENTERDEN observes in *Rex* v. *Brooks*, 8 B. & C. 321, 323. [COLERIDGE, J. But it will be contended that, although Rogerson was de facto appointed, yet, inasmuch as he was not duly appointed under the Municipal Corporation Act, he held at pleasure only, and therefore the statutes last cited do not apply.] That depends on the intention of the council in making the appointment. It might be an appointment for life, though irregularly made.

Next: the adjourned meeting was not duly convened for this purpose under sect. 69. It is true that no notice need be given of the special business to be transacted at the quarterly meetings; and true, also, that the quarterly meeting of November 9th was regularly adjourned. But it is clear that, in some way or other, notice must be given of special business to be done at adjourned meetings: otherwise the provision respecting notice might be altogether evaded, by transacting all business at those meetings. If the adjourned meeting is, substantially, a new one, notice ought to be given.

Watson, contrà. First: The office was not full; for Rogerson was a mere usurper, there being no existing court of Quarter Sessions at the

time of his supposed appointment. Moreover stat. 9 Ann. c. 20, extends to offices in a town corporate only, and the office of coroner does not possess that character: *Rex* v. *Williams*, 1 Burr. 402. Secondly: Grimshaw was duly appointed; for there was no necessity for giving notice of the business to be transacted at a quarterly meeting; and the power of adjournment is necessarily incident to a meeting regularly held. The question of notice is adverted to in **Rex* v. *Richardson*, 1 Burr. 517, 540. [COLERIDGE, J. If you are right on this point, a removal may be made in this manner as well as an appointment. The town clerk, for instance, who by stat. 5 & 6 W. 4, c. 76, s. 58, holds during pleasure, might have been removed at an adjournment of the meeting of 9th November without any notice.] The removal of an officer might not fall within the description of the "general business" to be transacted, under sect. 69, at the quarterly meeting; the appointment of a coroner clearly does. [*753

Martin, in reply. If the meeting of 16th November was a mere adjourned meeting, the three days' notice was unnecessary; but by giving the three days' notice this was made an original meeting, though nothing done at it could be valid, in consequence of the notice not specifying the business to be transacted. As to the first point: where a party continues to exercise the office, and all his acts are legally good, there is no vacancy, even though he might be removable by quo warranto; *Regina* v. *Phippen*, 7 A. & El. 966.

Lord DENMAN, C. J. I am of opinion that a coroner could not be legally elected at a meeting holden by adjournment without the notice and summons required by stat. 5 & 6 W. 4. c. 76, s. 69. But the more important question is, whether the appointment of Grimshaw was invalid by reason of the office being full. And of that I think there is no doubt. It is not contended that the appointment of Rogerson was invalid because not under seal. And, substantially, all the *requisites of the statute were fulfilled. The appointment was made as soon as the town council received information of the grant of a court of Quarter Sessions. For several years afterwards, the coroner performed all the duties. It would be highly dangerous to hold such an appointment void because, perhaps, the authority to make it was not formally complete when it was made. And, even independently of this, I think that, the corporation having acted towards this gentleman in the manner they have done, there was a perfect ratification. [*754

PATTESON, J. Wigan was a borough before the passing of the Municipal Reform Act: and the mayor was coroner by charter. The effect of the passing of stat. 5 & 6 W. 4, c. 76, was to abolish that part of the charter: "so much" of all charters, &c., as is "inconsistent with or contrary to the provisions of this act" being by sect. 1 expressly annulled. The mayor's power was therefore gone: and there was no coroner, until the grant of a court of Quarter Sessions. Now, it is

perhaps doubtful what was meant by the words, in sect. 62, that the appointment of coroner is to be made "within ten days next after the grant" of a court of Quarter Sessions "shall have been signified to the council." The council, however, understood the notification of an intended grant to satisfy those words, and appointed accordingly. Rogerson was therefore exercising the office when the grant was actually made, and within ten days after the corporation's acceptance of it. It cannot after this be said that he was a mere stranger and intruder. The general rule I take to be, that, if a person is in the actual exercise of an office, *755] although under an irregular appointment, that office is *full; it cannot be said to be vacant: and in this point of view it makes no difference whether such person has held it for six years or not. Lastly: I think that the election of Grimshaw was also invalid (even if the office had been vacant) by reason that no notice was given of the business to be transacted. If it were not held that such notice was necessary, all acts might be done at adjourned meetings, and the provisions of sect. 69 altogether evaded.

COLERIDGE, J. I agree in thinking that the office was full. The test is, whether a writ of mandamus would have gone to appoint Grimshaw? It would, if Rogerson was a mere intruder, and his acts only colourable. But that cannot be said. Appointment under seal is not shown to be necessary. If not, ratification may amount to appointment. To hold that a party placed in office by an irregular appointment, and acknowledged in the exercise of that office for many years, can be dismissed by merely appointing another, would produce very serious consequences. For my impression is (and I think that of the rest of the Court) that the coroner is not a corporate officer within the meaning of stat. 32 G. 3, c. 58, and therefore he may be removed after more than six years' tenure of office. But I think, moreover, that Grimshaw was improperly appointed, not so much for want of notice of the meeting at which the appointment took place as for want of summons. It is the summons which by sect. 69 is required to contain the specification of the business to be transacted. And I cannot think that this necessity can be evaded by the form of adjourning a quarterly meeting. The principle I take to *756] be, that a quarterly meeting *may indeed be adjourned to complete unfinished business, and that in such cases no summons may be necessary; but that no fresh business which may casually arise can be transacted at this adjourned meeting, unless notice and summons have been issued as required by sect 69.

[illegible], J., concurred on both grounds.

Judgment for the Crown.(a)

(a) Reported by H. Merivale, Esq.

RICHARDSON *v.* CHASEN. *June* 7.

Where the declaration for breach of an agreement to assign a lease alleged that plaintiff had been "put to great expenses, amounting to a large sum of money," &c., in investigating the title:

Held, that he might, by way of damage, recover the amount of a bill of costs due to his attorney for investigating the title, though such bill was not paid before action brought.

ASSUMPSIT on breach of an agreement, by which defendant undertook to sell his interest in a public house, and to make an effectual assignment thereof; averment that plaintiff "hath been necessarily *put to great expenses*, amounting to a large sum of money, to wit, 200*l.*, in and about the endeavouring to procure such title, sale and assignment as aforesaid, and in and about investigating the said title."

Plea: payment of money into Court, and that plaintiff had not sustained damages ultrà.

Replication: damages ultrà. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings in last Hilary vacation, it appeared that the plaintiff had incurred a bill of costs for investigation of the title; but that he had not paid the bill until after action brought. His lordship directed the jury that the *plaintiff was entitled to recover the amount of such bill; and the plaintiff had a verdict. Leave was given to move to reduce the damages by striking off such amount, if the Court should hold that the allegation that plaintiff had been "put to great expenses" was not sustained without proof of actual payment. [*757

Humfrey, in last Easter term, obtained a rule nisi accordingly. He cited *Jones* v. *Lewis*, 9 Dowl. P. C. 143, and *Taylor* v. *Higgins*, 3 East, 169.

Watson and *Warren* now showed cause. The declaration is in the usual form: 2 Chitty on Pleading, 211, 212, 7th ed. The attorney to whom the bill of costs was due was the plaintiff's agent; and any money paid by the attorney might be taken as paid by the plaintiff. But the phrase "put to expense" is fully satisfied by showing that the plaintiff was obliged to employ others for whose service he may be compelled to pay. In *Dixon* v. *Bell*, 1 Stark. N. P. C. 287, an action for injury to a servant, the declaration stated that plaintiff had been put "to great expense in medicines," &c.; and Lord ELLENBOROUGH told the jury that they were to consider the amount of the surgeon's bill as paid by the plaintiff, since the surgeon could compel the payment of it: a new trial was moved for by the defendant; but the ruling on this point was not objected to. *Pritchet* v. *Boevey*, 1 Cro. & M. 775, S. C. 3 Tyr. 949, is no authority against the plaintiff; for there the declaration alleged that the plaintiff "had been forced, and obliged to pay, and had paid, large sums of money," in procuring *his discharge. So in *Jones* v. *Lewis*, 9 Dowl. P. C. 143, the expres- [*758

sion was "forced to pay;" and in *Taylor* v. *Higgins*, 3 East, 169, the question was whether the plaintiff, who as surety had given a bond for defendant's debt, was entitled to hold him to bail for "money paid, laid out, and expended" "for the defendant's use." These three authorities show nothing more than that, where payment is alleged, it must be proved. But the word "expense" does not necessarily mean expense of money; for "expense of his moneys" is a phrase well known to the law; and, if the plaintiff had been a solicitor and had spent his time in personally investigating the title, he might have truly alleged that "he had been put to expense."

Humfrey and *Cleasby*, contrà. If the plaintiff had personally investigated the title, his position might be better than it is; for, at present, he cannot say that he had spent either time or money. But, if a man says he has been put to expense, he must be taken to mean expense of money. Had the plaintiff alleged merely that he had become "liable to pay," he might have recovered. The language of BAYLEY, B.'s judgment in *Pritchet* v. *Boevey*, 1 Cr. & M. 775, S. C. 3 Tyr. 949, is quite apposite to the present case: "This declaration does not allege that the plaintiff became liable to pay these costs, but that he was forced to pay a large sum of money. The evidence is, that an attorney was employed; but is he paid?—No. The plaintiff, then, cannot say that he was forced to pay, for it is only a debt which he may be hereafter forced to pay, but liable to contingencies, as if he be discharged by the bankrupt law; *759] therefore, it is *unreasonable that the plaintiff should recover what he may perhaps never pay." In *Dixon* v. *Bell* no question was raised upon the language of the declaration; so that there was no ruling of Lord ELLENBOROUGH on the present point.

Lord DENMAN, C. J. If a plaintiff chooses to allege in his declaration that he has paid money, he must prove that he has paid it; but, if he merely says that he has been "put to expense," the allegation is satisfied by proof that he has incurred a liability to pay.

PATTESON, J. In the cases cited for the defendant the declaration alleged that the plaintiff had "paid" or had been "forced to pay;" so that the question was simply as to the fact of payment.

COLERIDGE, J., concurred.

ERLE, J. I think the precedents have commonly been in this form, and that usage has attached to the word "expense" a meaning which does not include actual payment. Rule discharged.(a)

a) Reported by H. Davison, Esq.

*The Master and Fellows of UNIVERSITY COLLEGE, OXFORD, *v.* GARTON, Clerk. *June* 10. [*760

On an inquiry before a Tithe Commissioner under stat. 6 & 7 W. 4, c. 71, respecting the liability of certain lands to tithe, the landowner contended that they were exempt from payment of all tithes, except certain tithes of corn, grain, hay, &c., payable to the Bishop as appropriator thereof; and the vicar of the parish contended that they were liable to the render to him, as vicar for the time being, of all other than the excepted tithes. No one but the vicar claimed the tithes in question. The commissioner decided that the lands were subject to the payment of all tithes, other than the excepted tithes, to the "vicar for the time being." The landowner then delivered to the vicar a feigned issue, which, following the words of the commissioner, raised the question whether the tithes were payable "to the vicar for the time being." On motion to strike out so much of the issue as related to the vicar,

Held that, as the vicar was the only claimant, and as the commissioner had in terms decided that the tithes were payable to the vicar, the issue was not objectionable on the ground that it improperly raised a question of title, viz. to whom the tithes were payable, instead of the question, simply, whether they were payable at all.

COWLING had obtained a rule to show cause why the feigned issue herein, as delivered by the plaintiffs and settled by COLERIDGE, J., at chambers, should not be amended by striking out so much thereof as related to the vicar of Towcester.

Before an assistant tithe commissioner, appointed under stat. 6 & 7 W. 4, c. 71, to determine certain differences respecting the liability of the lands in the township of Handly in the said parish to certain descriptions of tithes, it appeared that the plaintiffs, who were the owners of all the lands in the township, claimed exemption from all tithes in kind, except certain tithes of corn, grain, hay, lamb, wool, and wood, which were payable to the bishop of Lichfield as appropriator thereof, and that the defendant, on the other hand, who was vicar of the parish, claimed that these lands were subject to the render in kind to the vicar for the time being of all manner of tithes, except the said tithes payable to the bishop. Neither the bishop, nor any other person, except the defendant, made claim to the tithes in question. The assistant commissioner decided that the lands of the plaintiffs were "subject to the payment *of all tithes," except the said tithes appropriate, "to the vicar of the said parish for the time being." [*761 The feigned issue, as settled by COLERIDGE, J., was whether the lands were liable "to render *to the vicar for the time being of the said parish* any manner of tithes." It was objected before the learned Judge that the words relative to the vicar improperly raised the question who was entitled to the tithes, as well as the question whether the lands were subject to the payment of them at all; and the matter was referred to the full Court.

Whitehurst now showed cause. In *Edwards* v. *Bunbury*, 3 Q. B. 885, on the authority of which the defendant will say that the proposed amendment should be allowed, it was held that, on a feigned issue under stat. 6 & 7 W. 4, c. 71, s. 46, the landowner could not deny that his lands were subject to the payment of tithe to Sir E. Bunbury, for the purpose of raising a question of title to tithe as between Sir E. Bunbury

and a third party. But in that case there were rival claimants of the tithe;(a) whereas, in the present case, the bishop's claim to the appropriate tithes was admitted, and neither he nor any other person disputed the vicar's title to the tithe in question, if payable at all. The commissioner has in terms decided that the tithe is payable to the vicar; and "the appeal from the commissioner's decision must be precisely from that which he has decided;" per Lord ABINGER, C. B., in *Earl of Stamford* v. *Dunbar*, 12 M. & W. 414.

Cowling, contrà. The issue in its present form must put in question the vicar's title; and *Edwards* v. **Bunbury* decides that such a
*762] matter cannot be tried either before the commissioner or on the issue. [COLERIDGE, J. The bishop is out of the question according to the case on both sides.] If the words relative to the vicar are struck out, the plaintiffs can try all that it is competent to them to try, namely, whether the tithe is payable at all, not to whom. If there is no claim but the vicar's, why should the issue be put in such terms as to let in the question, whether he or some other person is entitled? At present the issue is double. [COLERIDGE, J. If the amendment were made, that would let in the question whether the tithe is payable as between landowner and vicar and also as between landowner and rector. ERLE, J. And you would claim the verdict, even if it appeared that some one else, and not the vicar, was entitled.] All the commissioner has to do is to ascertain the amount of tithe payable. *Edwards* v. *Bunbury* and *Birch* v. *Barker*,(b) seem to be decisive against the issue in its present form. [PATTESON, J. Suppose the issue to be amended as you propose, and the jury to find that the tithe is payable; to whom would the commissioner give the tithe?] To the vicar. [PATTESON, J. Then why not raise the question in terms?]

Lord DENMAN, C. J. I think the issue right as it is, and that it would be wrong if it were in any other form.

PATTESON, J. The issue proposed would raise a question, the decision of which would determine nothing.

*COLERIDGE, J. Mr. *Cowling* has pointed out inconvenience
*763] consequent upon the issue in its present form. It is clear that there would also be inconvenience consequent upon the proposed amendment. I think, therefore, we may look to the form of the commissioner's decision. The issue is an appeal from his decision; and his decision is confined to the liability of these lands to pay tithe to the vicar.

ERLE, J., concurred. Rule discharged.(c)

(a) See 3 Q. B. 890.
(b) Cited in note to *Edwards* v. *Bunbury*, 3 Q. B. 888, note (b).
(c) Reported by H. Davison, Esq.

The QUEEN *v.* The Justices of the West Riding of YORKSHIRE. (Re VINCENT, a Lunatic.) *June* 10.

A mandamus commanded justices to hear an appeal against an order adjudging the settlement of a lunatic pauper to be in L., and ordering the overseers of L. to pay a sum of money so long as the lunatic should be confined in the county asylum under another order of the same date by the said justices. The return set out that the order "mentioned and referred to in the said writ" was made on the day of its date, and other facts relating to "the said order," as justifying the refusal to hear the appeal: *Held*, that it sufficiently appeared in the return that "the order" mentioned in the return was that against which the writ directed the justices to hear the appeal.

The appeal against an order adjudging the settlement of a lunatic pauper under stat. 9 G. 4, c. 40, s. 38, is under sect. 54 of that act, and not under sect. 60.

But the provision of stat. 4 & 5 W. 4, c. 76, s. 79, that a pauper shall not be removed until twenty-one days after a copy or counterpart of the order has been served on the parish to which the removal is directed to be made, is not incorporated in sect. 54, and is not applicable to the case of lunatic paupers.

Therefore the next practicable session to try an appeal against such order is that for which notice of appeal can be given, according to the ordinary practice of the sessions, irrespectively of stat. 4 & 5 W. 4, c. 76, s. 79.

MANDAMUS. The writ, directed to the justices of the peace in and for the West Riding of Yorkshire, recited that at the general quarter sessions *holden by adjournment at Bradford, in and for the said Riding, on the 1st July, A. D. 1845, an appeal, theretofore [*764 entered by and on behalf of the churchwardens and overseers of the poor of the parish of Liverpool in the county of Lancaster, against *an order* under the hands and seals of Joseph Armitage and John Sutcliffe, Esquires, two of the said justices, and bearing date the 8th March, A. D. 1845:—whereby the last legal settlement of Mary Vincent, an insane pauper, was adjudged to be in the said parish, and the overseers of the poor of the said parish were ordered to pay to the treasurer for the time, from time to time being, of the Lunatic Asylum in and for the said Riding, weekly and every week from the time of the said Mary V. being first placed in the said asylum by virtue of a *warrant or order* in that behalf under the hands and seals of the said J. Armitage and J. Sutcliffe, Esquires, so being such justices as aforesaid, and bearing date the said 8th March, A. D. 1845, so long as the said Mary V. should continue in the said asylum by virtue of the said last mentioned *warrant or order* in that behalf, the sum of 5*s.* 6*d.* for the maintenance, care, &c., of the said Mary V., so long as that sum should continue to be the weekly sum fixed upon in that behalf by the visitors of the said asylum; and such other weekly sum, after 5*s.* 6*d.* should cease to be the sum so fixed, as should be from time to time fixed upon in that behalf by the visitors under the provisions of the statute in that case, &c., or otherwise according to law:—came on to be heard; and that the said justices before whom such sessions were holden were required on the part of the said overseers of Liverpool to hear and determine the merits of the said appeal, but refused, &c.

*765] *Return: "that *the order* under the hands and seals of Joseph Armitage and John Sutcliffe, Esquires, two of us the said keepers of the peace and justices aforesaid, which order is mentioned and referred to in the said writ, was made by them the said J. A. and J. S. on the 8th day of March, A. D. 1845, the day of the date of the same order; and that the quarter sessions mentioned in the writ were holden by adjournment from the holding of the same quarter sessions at Skipton, in and for the same Riding, on the 30th of June, 1845, which last mentioned day was the day of the commencement of the same quarter sessions. That the said order, made and bearing date on the 8th of March, A. D. 1845, was served on and delivered to the churchwardens and overseers of Liverpool in the writ mentioned on the 13th of March, A D. 1845; and that the said churchwardens," &c., of Liverpool on the said 13th day of March, A. D. 1845, had notice of the said order so made and dated on the 8th day of March, A. D. 1845, and then became and were entitled to appeal against the same to and at the next general quarter sessions of the peace, to be holden in and for the said West Riding." The return then stated that such next general quarter sessions were holden on 7th April, 1845, and that no appeal against the said order was there entered, nor was any application there made to enter such appeal. That the interval between 13th March, 1845, and 7th April, 1845, was more than sufficient to have enabled the said churchwardens, &c., of Liverpool to have entered and prosecuted an appeal against the said order at the said quarter sessions so holden on 7th April, 1845; and that, according to the practice and rule of the quarter sessions for

*766] the West Riding, ten *clear days' notice from appellant to respondent for the trial of an appeal is all that is required. Wherefore the keepers of the peace in quarter sessions assembled at Bradford did, as in the said writ mentioned, refuse to hear and determine the said appeal then brought forward, and there proposed to be lodged for the first time, and which appeal had not been entered and respited at any previous quarter sessions, &c., for the said West Riding, &c.(*a*)

(*a*) The return then went on: "And we further humbly certify," &c.: "That it does not appear by the said writ when the order therein mentioned was made, nor when the first General Quarter Sessions for the West Riding next after 13th March, 1845, were so holden, nor whether it was practicable for the said churchwardens, &c., of Liverpool to have tried their said appeal at the Quarter Sessions so first holden, nor when the pretended right of appeal of the churchwardens, &c., of Liverpool against the said order first accrued, or that such right ever accrued to them; and that the writ fails to state any such facts as show that it was the duty of the justices to hear and determine the appeal at the said Quarter Sessions holden on 1st July, 1845."

Peshley, in support of this part of the return, contended that the prosecutors had not shown any duty incumbent on the justices to hear the appeal at the July sessions, inasmuch as the mandamus did not state either when those sessions *commenced*, or when the appellants were served with the order appealed against. He cited *Rex* v. *The Justices of Leicester*, 7 B. & C. 6, 13; *Rex* v. *Heptonstall*, Bur. S. C. 88; *Regina* v. *Ardsley*, 5 Q. B. 163; *Peat's Case*, 6 Mod. 310; *Rex* v. *The Bishop of Oxford*, 7 East, 345; *Rex* v. *The Margate Pier Company*, 3 B. & Ald. 220; *Regina* v. *The Eastern Counties Railway Company*, 10 A. & E. 531; and Jervis on Coroners, p. 62.

Pickering, contrà, contended that the objections were captious, and the writ in the usual form:

General demurrer: and Joinder.

The case was argued this term.(*a*)

**Pickering*, for the Crown. First. Two orders are mentioned in the writ, both bearing the same date, and under the hands and seals of the same justices: and the return leaves it uncertain which is "the order" there referred to. A return ought to be certain; Com. Dig. *Mandamus* (D 5), *Rex* v. *Lyme Regis*, 1 Doug. 79, *Rex* v. *Clapham*, 1 Ventr. 110, *Ex parte Eden*, 2 M. & S. 226, *Deybel's Case*, 4 B. & Ald. 243, *Sowden's Case*, 4 B. & Ald. 294. Secondly, Stat. 9 G. 4, c. 40, s. 54, gives an appeal against orders adjudicating the settlement of lunatics, "in like manner and under like restrictions and regulations as against any order of removal." Under this clause the appellants are entitled to import into the statute the subsequent provision of stat. 4 & 5 W. 4, c. 76, s. 79, which gives to those on whom orders of removal are served twenty-one days for considering whether they will appeal, as well as a further period of fourteen days, under sect. 81, before the quarter sessions for serving the respondents with the grounds of such appeal; *Regina* v. *The Justices of Lancashire*, 4 Q. B. 910. Stat. 4 & 5 W. 4, c. 76, does not give any fresh right of appeal, but only annexes conditions under which the previously existing right is to be exercised; *Regina* v. *The Recorder of Leeds*, 8 Q. B. 623. Stat. 9 G. 4, c. 40, placed the practice of appeals, in the case of lunatic paupers, on the [*767 same footing with the practice in ordinary cases of removal from parish to parish: and the reasonable construction of the statute is that which since the statute 4 & 5 W. 4, c. 76, will continue both classes of appeals on *the same footing. The legislature must be taken to have intended what is plainly consonant to reason and good discretion; [*768 *Stradling* v. *Morgan*, Plowd. 199, 205; except where a less reasonable construction is enforced by unambiguous language; *Regina* v. *The Leeds and Liverpool Canal Company*, 7 A. & E. 671, 691. A strong argument in favour of the present view is derived from statutes 1 & 2 Vict. c. 14, s. 2, 3 & 4 Vict. c. 54, s. 5, and 8 & 9 Vict. c. 126, s. 62; each of which, in respect of appeals against orders adjudging settlements of lunatics, clearly incorporates the conditions of appeal defined by stat. 4 & 5 W. 4, c. 76. The appellants were therefore entitled, under stat. 4 & 5 W. 4, c. 76, s. 79, to twenty-one days for considering whether they would appeal, and, in addition, ten days, the time of notice required by the practice of the sessions: consequently they were not bound to appeal to the April sessions.

Pashley, contrà. 1. The return plainly refers to the order against which the right of appeal is claimed by the writ, and alleges service of that

and he cited Corner's Practice on the Crown Side, &c., Appendix, p. 138; Archbold's Practice of the Crown Office, 230; and *Rex* v. *Ward*, 2 Str. 893.

See the judgment of the Court, p. 771, post.

(*a*) May 29th and June 2d. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

order on the overseers of Liverpool, and that they were entitled to appeal against "the same" at the April sessions: no appeal exists against the warrant under which a lunatic is sent to an asylum: moreover there is only one "order" spoken of simply as such in the writ, the second document being called a "*warrant or* order:" and, lastly, the objection that the return is ambiguous and fails to show whether it refers to the one document or the other could be raised only on special demurrer, since the passing of stat. 6 & 7 Vict. c. 57, s. 1; for that act gives the *right
*769] to demur, in cases of mandamus, only in the same manner as in personal actions. 2. As to the main question. Stat. 4 & 5 W. 4, c. 76, s. 79, applies only to appeals against orders removing poor persons from parish to parish. Its provisions may be applied even in the case of a suspended order, as seems to have been done in *Regina* v. *The Justices of Lancashire*, 4 Q. B. 910; for the suspension may be taken off at any time, and the removal effected. The obvious intention of stat. 4 & 5 W. 4, c. 76, s. 79, was to enable those who would be prejudiced by such removal to prevent its taking place before the determination of their appeal. No such provision, therefore, as that of sect. 79 was needed in the case of lunatics: and accordingly WILLIAMS, J., held it "utterly inapplicable" to that case, when cause was shown against the issuing of the present writ; *Regina* v. *Justices of the West Riding*, 5 D. & L. 16:(*a*) and the writ issued only because the learned Judge declined to conclude the prosecutors by his own view. If the appeal is under sect. 60, as was assumed in *Regina* v. *Pixley*, 4 Q. B. 711, and not under sect. 54 of stat. 9 G. 4, c. 40, there is no pretence for supposing an incorporation of sect. 79 of stat. 4 & 5 W. 4, c. 76. But probably the court will think that the appeal is not given under sect. 60, but under sect. 54; *Regina* v. *The Justices of Kent*, 2 Q. B. 686: and WIGHTMAN, J., considered that it was not under sect. 60, in *Regina* v. *Recorder of York*, 4 D. & L. 376. If sect. 54 gives the appeal, the question will turn upon the proviso that the officers of the parish in which the justices *"shall adjudge any insane person to be settled, may appeal
*770] against such order to the general quarter sessions of the peace to be holden for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of such county, who shall be respondent in such appeals; which appeal the justices of the peace assembled at the said general quarter sessions are hereby authorised and empowered to hear and determine, in the same manner as appeals against orders of removal are *now* heard and determined." The whole effect of this clause is to incorporate, as if re-enacted, in stat. 9 G. 4, c. 40, all *then* existing conditions of appeal against orders of removal, and those conditions only; *Regina* v. *Stock*, 8 A. & E. 405, *Regina* v. *Silversides*, 3 Q. B. 406. The words "are

(*a*) Note (*a*) to *Regina* v. *Justices of Middlesex*.

now heard and determined" are unambiguous, and must be construed on the principle laid down in *Rex* v. *Great Driffield*, 8 B. & C. 684, 690, that every statute must be understood according to the plain and ordinary import of its words, unless the Court is bound to adopt some different construction by an uniform course of well considered decisions, or unless the more obvious interpretation "would lead to such consequences," that we can safely pronounce that the legislature "must have had a different intention from that which the ordinary import of the words conveys." A similar rule is sanctioned by the Court of Exchequer in *Edmonds* v. *Lawley*, 6 M. & W. 285, 289, per PARKE, B.

It does not indeed appear that the removal of the lunatic in this case was not under stat. 9 G. 4, c. 40, s. 44; *in which case no grounds of appeal, under sect. 46 or sect. 54, would be needed. [*771 If the removal was under that clause, then, the lunatic not having been chargeable, notice of his being "chargeable to or relieved" in any parish could not be given according to stat. 4 & 5 W. 4, c. 76, s. 79. It is observed on the other side that stat. 1 & 2 Vict. c. 14, s. 2, stat. 3 & 4 Vict. c. 54, s. 5, and stat. 8 & 9 Vict. c. 126, s. 62, do incorporate the provisions of sect. 79 of 4 & 5 W. 4, c. 76: but that is done by express reference; which is not to be found in stat. 9 G. 4, c. 40, s. 54.

Pickering was heard in reply. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

We are satisfied that the return to the mandamus in this case is sufficiently certain. No person, we think, can doubt, on reading it, that the order mentioned in it is that which was addressed to the churchwardens and overseers of Liverpool, and which formed the subject of the appeal to the Quarter Sessions.

Objections were made to the writ itself; but we do not think it necessary to notice them.

The main question is, whether the 79th section of stat. 4 & 5 W. 4, c. 76, applies to this case: and that question is directly raised; because it is plain that the appeal was too late if it depended on stat. 9 G. 4, c. 40, only, whether we treat it as founded on the 46th or 54th section of that act. It is true that in *Regina* v. *Pixley*, 4 Q. B. 711, *section 60 was treated as the clause giving the appeal: but it appears to us to be clear, on further consideration of the statute 9 G. 4, c. 40, as it did to Mr. Justice WIGHTMAN in *Regina* v. *Recorder of York*, 4 Dowl. & L. 376, that the 60th section applies to cases of penalties under the act, and not to orders for maintenance, and that the 54th section gives the appeal, as the late Mr. Justice WILLIAMS held when he made this rule for a mandamus absolute.(*a*) [*772

On consideration we agree with that learned Judge in what he stated to be his impression, rather than his opinion, with regard to the 79th

(*a*) *Regina* v. *Justices of the West Riding*, note (*a*) to *Regina* v. *Justices of Middlesex*, 5 Dowl. & L. 16.

section of stat. 4 & 5 W. 4, c. 76. That section was framed with a view to prevent the hasty removal of paupers upon orders obtained ex parte, and which might afterwards be litigated. It does not, in express terms, alter the time for appeal; but it does by implication, because it gives twenty-one days for the officers of the parish, to which it is sought to remove the pauper, to make up their minds whether they will receive him or appeal; and, if they determine on the twentieth day to appeal, it is plain that they must still have the usual time to give notice: but the section is in most respects inapplicable to orders adjudicating upon the settlement of lunatic paupers who are sent to an asylum and are not removable from it, and therefore not within the mischief as to hasty removals, and who perhaps were never chargeable at all to any parish, but were wandering lunatics. Unless, therefore, we are compelled by some strict rule to hold that, by the words of the 54th section of stat. 9 G. 4, *c. 40, "in like manner and under like restrictions and regulations as against any order of removal," the provisions of subsequent acts of parliament regulating such appeals are necessarily incorporated with it, as well as those of acts then in existence, we should certainly exclude the 79th section in question.

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In the case of *Regina* v. *The Justices of Lancashire*, 4 Q. B. 910, it was held that the 79th section of stat. 4 & 5 W. 4, c. 76, applies to suspended orders of removal, though the time for appealing against them is made, by the statute 49 G. 3, c. 124, s. 2, to be computed from the time of serving such order; and that decision is quite right; for suspended orders of removal are within the mischief of hasty removals, and the 79th section is entirely applicable to them. The execution of them is suspended only till the pauper can safely be removed, which may be much sooner than twenty-one days: whereas, in the case of lunatics, there is no order of removal at all. We were, however, pressed with an argument that, as three statutes regarding lunatic paupers passed since stat. 4 & 5 W. 4, c. 76, plainly incorporate the 79th section of that act, viz. stats. 1 & 2 Vict. c. 14, s. 2, 3 & 4 Vict. c. 54, s. 5, and 8 & 9 Vict. c. 126, s. 62, which last repeals stat. 9 G. 4, c. 40, therefore we must suppose that the legislature intended the 79th section to apply to stat. 9 G. 4, c. 40. We do not think that this consequence necessarily follows. Whether the legislature in those three statutes passed in the present reign fully adverted to the terms of the 79th section in question being in a great measure inapplicable to orders for the maintenance *of lunatic paupers or not, may be doubtful; the language used in them does incorporate the section so far as it is applicable, and must have its legitimate effect; but we are not therefore obliged to incorporate the section into a former act, the language of which does not compel us to do so.

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Upon the whole, we are of opinion that this appeal was too late, and

that judgment must be given for those who have made the return to this writ of mandamus. Judgment for defendants.(*a*)

(*a*) Reported by H. Merivale, Esq.
See *Regina* v. *The Justices of Glamorganshire*, post, Easter term (May 5th), 1849.

*THOMAS *v.* FREDRICKS. *June* 10. [*775

Declaration on a written agreement, not under seal, by plaintiff to let land to defendant with right of sporting, defendant to make satisfaction to plaintiff's tenants for damage done by game on their farms, the amount to be ascertained by a valuer to be chosen by each party and an umpire: averment, that defendant entered, and preserved the game, which did damage to the tenants; that defendant was requested by plaintiff to appoint a valuer: breach, that, although within a reasonable time a valuer was appointed by plaintiff and notice thereof given to defendant, and plaintiff requested him to give the name of a referee on his part, and fix a time, &c., of meeting to ascertain the damage, &c., in default of which the plaintiff's valuer would alone ascertain the damage done, yet defendant did not give notice to plaintiff of any valuer chosen by him, nor has ever made satisfaction, &c.

Held: 1. That after verdict it must be taken that the declaration alleged a refusal by defendant to appoint a valuer.

2. That, although the right to shoot did not pass under this contract, being an incorporeal hereditament, yet the agreement to make compensation was valid, and good ground for an action, defendant having had the full benefit of such agreement.

3. That, for the same reason, the declaration was not bad for not averring performance of a condition precedent.

4. The jury having found that plaintiff did not give notice in a reasonable time of his appointment of a valuer: *Held*, on motion for judgment non obstante veredicto, that, inasmuch as defendant had refused to appoint altogether, this was an immaterial allegation.

5. Defendant having refused an offer of the plaintiff to rectify an alleged defect in the assessment of damages, viz. that it included damages done by rabbits: *Held*, that he was not entitled to a new trial on account of misdirection by the Judge in directing the jury to include such damages.

ASSUMPSIT. The declaration set out the following agreement in writing. "Mr. Goring Thomas hereby agrees to let to Mr. Frederick Fredricks, who hereby agrees to take from him, the house at Llanon in the county of Carmarthen, with the field adjoining, lately in the occupation of Mr. Thomas, and the free and exclusive right of sporting over Mr. Thomas's different farms in the several parishes of Llanon and Llanelly" (with an exception, not now material), "together with the use of the keeper's lodge and dog-kennels," &c., "for the space of two years from Lady-day 1843, at the yearly rent of 52*l.* 10*s.* payable quarterly, and free and clear of all deductions whatsoever. Mr. Fredricks" to pay rates and taxes, to keep the lodge, &c., in repair. "Mr. Fredricks also agrees to pay the hire of gamekeepers, and all other expenses incident to the preservation of the game, and to make satisfaction to *Mr. Thomas's [*776 tenants for any damage done by the game upon their respective farms, as well as to the tenants of any other farms over which Mr. Thomas has hitherto sported and over which Mr. Fredricks may continue to preserve the game; the amount of such damage to be ascertained by two indifferent persons, one to be chosen by each party; and, in the

event of any disagreement between the referees, by an umpire to be chosen by them." (The remainder is now immaterial.)

Averment, that afterwards, to wit, on, &c., in consideration that the plaintiff then promised the defendant, &c. (mutual promises to fulfil the agreement). That defendant thereupon entered and became possessed for the term of two years, in the agreement mentioned. That, during the said term, one John Edwards was, and down to the making of the agreement afterwards mentioned continued to be, tenant of seven of the plaintiff's farms (other than the portion excepted) in the agreement mentioned. That, during the said term, defendant continued to preserve game on the said seven farms, and enjoyed the exclusive right of sporting over them. That during the said term, and whilst the defendant so preserved the game, to wit, on, &c., the said game so preserved by defendant upon the said last mentioned farms did great damage to the said last mentioned farms, to wit, to the amount, &c.: that defendant had notice of such damage, to wit, on, &c., and was then requested by plaintiff and the said John Edwards, as such tenant to plaintiff, to choose, nominate and notify within a reasonable time, to wit, &c., some indifferent person on his, the defendant's, part and behalf, to ascertain, together with one indifferent person to be chosen and nominated on behalf of the other party as in the *said agreement mentioned, the amount of the damage. Breach, that, although the said term of two years, and a reasonable time for the ascertaining of the said damage as in the said agreement mentioned, and for the choice, &c., of such indifferent person, &c., and for the making of satisfaction to the said John Edwards as such tenant, &c., had elapsed long before the commencement of this suit, and although within such reasonable time, to wit, on, &c., one indifferent person, to wit, one William Moody, on the part of the other of the said parties as in the said agreement mentioned, was chosen and nominated, and notice thereof afterwards, and within such reasonable time as aforesaid, to wit, on, &c., given by and on behalf of plaintiff and the said John Edwards as such tenant; and although defendant was then, to wit, on, &c., requested by plaintiff and Edwards to apprise them within a reasonable time, to wit, ten days, &c., of the name, &c., of a referee on defendant's part, and to fix a time and place for meeting plaintiff's referee to ascertain the damage, &c., and notice given by plaintiff to J. E. that, in default of compliance, the said W. M. would proceed alone to ascertain such damage; and although the ten days elapsed, &c.: yet defendant never at any time gave notice to plaintiff, or J. E., or W. M., &c., of any person chosen on his part to ascertain the amount of such damage, &c., nor made satisfaction to any amount for such damage.

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The declaration proceeded to aver that, on the expiration of the said ten days, to wit, &c., W. M., no person attending on the part of defendant, ascertained the damage aforesaid, as amounting to the sum, &c.;

nevertheless, although plaintiff had notice and was requested, &c., he has refused to make any satisfaction, *&c. That plaintiff, as landlord of J. E., had agreed with J. E., by the terms of his tenancy, to compensate him, J. E., for all damage done by game preserved by plaintiff during such tenancy; whereby plaintiff became and still is liable to pay to him the said J. E. the amount of such damage, amounting (to wit) to 340*l.* Damages, 400*l.* [*778

Pleas, 1. Non assumpsit. 2, 3, 4, 5, 6, 7. Traversing different allegations in the declaration. 8. That, although notice, that one indifferent person on the part and behalf of the other of the said parties had been chosen and nominated, was given to the defendant, yet such notice was not given to the defendant within such reasonable time as in the said declaration mentioned, in manner and form as in the declaration in that behalf alleged. 9, 10. Traversing other allegations. Issues thereon.

On the trial, before WIGHTMAN, J., at the Caermarthenshire Spring Assizes, 1846, the jury found for the plaintiff on the seven first issues, damages 60*l.* for damage done by rabbits and game in 1843; 45*l.* for the same in 1844: and for the defendant on the eighth issue.

In the following term,

Chilton obtained a rule to show cause why judgment should not be entered for the plaintiff on the eighth issue, *non obstante veredicto*. And, in the same term,

E. V. Williams, for the defendant, obtained a cross rule to show cause why judgment should not be arrested, on the following grounds: 1. That the agreement was void, as it purported to pass an incorporeal hereditament, and was not under seal: *Bird* v. **Higginson*, 2 A. & E. 696.(*a*) 2. That, inasmuch as the agreement was that the damages were to be assessed by referees, the defendant's alleged omission to give notice of having appointed a referee could not make the assessment of damages by the plaintiff's referee alone available to bind the defendant. *Williams* also obtained a rule nisi for a new trial on the ground that the jury, under a misdirection of the Judge, had included, in their assessment of damage, that which was done by rabbits as well as by game. [*779

Chilton and *Peacock*, in this term,(*b*) showed cause against *Williams's* rule to arrest judgment. 1. *Bird* v. *Higginson* is distinguishable; for the consideration here is executed, it being alleged that the defendant enjoyed the exclusive right of sporting during the term. The defendant, therefore, had the whole benefit of the agreement, and was bound to pay for it. Although tithes will not pass without deed, still, if a party bargains for tithes and retains them, he is bound to pay for them. So here, possibly, neither plaintiff nor defendant could have been compelled to perform the agreement; but, it having been performed by one

(*a*) Judgment affirmed on Error, *Bird* v. *Higginson*, 6 A. & E. 824.
(*b*) May 22d. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

party, the other is bound to pay. Supposing a man had used and enjoyed a right of way; he could not set up in defence that it was not granted under seal. [Lord DENMAN, C. J. Not if the action were brought in respect of the enjoyment. Here it is brought in respect of the agreement itself.] 2. The plaintiff in this case would have been *780] entitled *to appoint a referee by himself; and the defendant would have been bound by that referee's assessment if defendant had refused to appoint a referee. But it is argued that the declaration here avers as a breach, not that the defendant refused to appoint, but that he refused to give notice of any person chosen and nominated on his behalf. Possibly such an objection might be good on special demurrer. But, after verdict, it must be taken that a refusal to give notice of a nomination, is, in effect, a refusal to nominate: or, in other words, that the giving notice is part of the act of nomination, which would be wholly useless without it.

Butt and *J. Gray*, contrà. If a new agreement arose in this case from the actual enjoyment by the defendant, it may be a question whether indebitatus assumpsit might not lie, either in the common form or in that of a special declaration on such agreement. But the test, as appears from *Bird* v. *Higginson*, 2 A. & E. 696, 6 A. & E. 824, is, whether the plaintiff is compelled to resort to the void contract: if so, he cannot recover. [PATTESON, J., referred to *Mortimer* v. *M'Callan*, 6 M. & W. 58.] Or, again, an action would have lain for refusing to allow the defendant the benefit of the agreement, although the agreement itself passed nothing: as, for not giving possession of a house pursuant to an agreement; *Coe* v. *Clay*, 5 Bingh. 440.(*a*) 2. The compensation is to be ascertained in the mode pointed out by the parties in their agreement, and in no other. No doubt that an action would lie for not nominating an *781] arbitrator. But there is no express agreement in *the declaration, that the party nominating an arbitrator is to give notice of his nomination to the other side.

Lord DENMAN, C. J. As to the second point, the distinction contended for by the defendant might possibly be a ground of demurrer, but, I think, very special. In point of fact, neither party can be said to have chosen an arbitrator, until he lets the other party know the object of his choice. "Nomination" implies notice. On this ground, therefore, I think the judgment cannot be arrested.

PATTESON, J. Perhaps, on special demurrer, this averment might have been objected to as a negative pregnant. But, after verdict, the averment that the defendant gave no notice of his nomination is the same as that he did not nominate at all.

COLERIDGE, J. After verdict, an allegation that one of the parties omitted to do something essential towards nomination, namely, to give notice of it, is, in effect, an allegation that he did not nominate.

(*a*) S. C. 3 Moore & Payne, 57.

ERLE, J. I think, provided the essential breach be clearly averred, as it is here, namely, that the defendant did not make satisfaction in damages to the plaintiff, it is not necessary after verdict to require the strictness contended for by the defendant in the other allegations.

As to the first point, *Cur. adv. vult.*

Chilton and *Peacock* next showed cause against the rule for a new trial on the ground of misdirection; *having, on the part of the plaintiff, offered to leave the amount of damages to be rectified, if wrongly assessed, by arbitration; which offer was rejected by the defendant. [*782

Butt and *Gray*, contrà, relied on stat. 1 & 2 W. 4, c. 32, s. 2.

Cur. adv. vult.

Butt and *Gray* then showed cause against the rule for judgment non obstante veredicto on the eighth issue. From the opinion given by the Court as to the materiality of the allegation, that the defendant never gave notice of appointing an arbitrator, it follows that this issue is also material, namely, whether notice of such appointment was given on the part of the plaintiff.

Chilton and *Peacock*, contrà. The defendant having (according to the opinion of the jury, and also of this Court) in effect refused to appoint any valuer, the allegation that the plaintiff did not give notice of such appointment on his part is quite immaterial. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court on the rule to arrest judgment or for a new trial.

In this case a motion was made in arrest of judgment, on two grounds, one of which was disposed of during the argument: the other was that the agreement set out in the declaration to let the shooting over a manor was void, because it agreed for an incorporeal right, lying in grant, and passing only by deed.

*But it appears to us that this ground cannot be sustained; for, although the agreement did not pass the right to the shooting, still it is not for that reason void. An agreement to execute a conveyance is valid as an agreement, though it does not operate to pass an estate; and its validity is not affected by the question whether the subject of the deed be incorporeal or corporeal. [*783

It was also contended that the declaration ought to have shown a grant by deed, and that it was therefore bad for not averring performance of a condition precedent. But, as the right is stated to have been enjoyed during the whole period agreed for, and as the absence of a grant would not occasion any damage to the defendant, we should hold that he had received the substance of the consideration agreed for, even if after verdict it must be intended that a grant was not made.

This decision is not at variance with *Bird* v. *Higginson*, 2 A. & E. 696, 6 A. & E. 824. The plaintiff there failed in an action for rent, or payment in the nature of rent, claimed to be due under a similar

agreement, because enjoyment of the right for the time agreed for did not appear on the declaration, but only an entry by the defendant.

The defendant also moved for a new trial, because the jury included in their verdict the damage by rabbits as well as that by game. But, inasmuch as the trial was properly conducted down to the assessment of the damages, and as the defendant has refused every offer of the plaintiff to rectify any mistake in that assessment, if there be any, without setting aside the verdict on the issues, and as the injury done by the rabbits may be considered a consequence from the preservation of the
*784] *game, we think that he ought not to obtain the advantage of objecting to the finding of the issues under the pretext of objecting to the amount of damages; and that his rule must be discharged.

Rule discharged.

Lord DENMAN, C. J., on the following day (June 11th), delivered the judgment of the Court on the rule for judgment non obstante veredicto.

In this case we are of opinion that the rule ought to be made absolute for judgment for the plaintiff, notwithstanding the verdict for the defendant on the eighth issue, finding that the plaintiff did not notify to the defendant his choice of an arbitrator within a reasonable time. It appears by the record that the defendant was requested to appoint an arbitrator on his part, and refused to do so within a reasonable time. In effect he refused to proceed by arbitration. It is therefore immaterial whether the plaintiff chose an arbitrator, or notified his choice, at any time; and the verdict on this issue is consequently on an immaterial fact, and does not prevent the plaintiff from having judgment.

Rule absolute for judgment non obstante veredicto on the eighth issue.(a)

(a) Reported by H. Merivale, Esq.

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*785] *COLLETT v. CURLING. *June* 12.

Agreement to let and take premises "from the 25th March, 1844, for a twelvemonth certain, and thence for the continuance of the term of the lessor's interest in the premises, so long as it shall continue, until determined by a six months' notice from the tenant, expiring at any quarter of a year, at the rent of 120*l.* a year:" *Held* that the rent was payable yearly, and that rent for a quarter ending 25th December, 1845, could not be recovered in an action for use and occupation.

ASSUMPSIT for use and occupation of apartments.

Plea: Non assumpsit. Particular of demand, 30*l.* for one quarter's rent due at Christmas, 1845. The action was commenced January 30th, 1846. On the trial, before WIGHTMAN, J., at the Westminster sittings after Trinity term, 1846, the following memorandum of an agreement was put in for the plaintiff, dated 29th March, 1844.

"Miss Mary Jane Collett this day agrees to let to, and Mr. John

Curling agrees to take, the second floor in the house No. 4, Waterloo Place, Pall Mall, with the right of entry and exit at all times thereto. To hold from the 25th day of March, 1844, for a twelvemonth certain, and thence for the continuance of the term of Miss Collett's interest in the said premises so long as it shall continue, until determined by a six months' notice from the said John Curling, expiring at any quarter of a year; at the rent of 120*l.* a year, free from all rates and taxes, which are not to be borne by the said John Curling. The above sum of 120*l.* a year to include attendance," &c.

The tenancy was still subsisting, and the defendant in possession of the rooms; but he contended that the agreement made the rent payable not quarterly but yearly. The jury found for the plaintiff, leave being reserved to move to enter a nonsuit. *Watson* having obtained a rule nisi accordingly,

*Sir *J. Jervis*, Attorney General, and *Welsby* showed cause.(*a*) [*786 Although the words of the letting may import a yearly payment of rent, the agreement has provisions inconsistent with that construction. If the payment of rent is yearly, the tenant may have to pay rent for a whole year, though he occupies only for part. Suppose, for instance, that after nine months' occupation the tenant gives six months' notice to quit; which he may do, as the notice may expire "at any quarter of a year:" he must either pay a year's rent for the three months, or pay nothing. In *Packer* v. *Gibbins*, 1 Q. B. 421,(*b*) the rent, though received quarterly, was held in an action for use and occupation to be accruing de die in diem.

Watson, contrà. *Turner* v. *Allday*, Tyr. & G. 819, shows that the agreement, as to the first twelvemonth, was for a yearly payment; and there is nothing to change the construction as to subsequent years. *Packer* v. *Gibbins* proves only that, if the tenancy had been determined in the middle of a subsequent year, rent might have been recovered pro tanto in an action for use and occupation: and that furnishes an answer to the plaintiff's argument. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

In this case the question was whether the rent was payable quarterly or yearly. The agreement for the rent of 120*l.* *a year* would make it payable yearly, unless the stipulation for determining the tenancy by a six months' notice, expiring at any quarter of a year, *raises a [*787 presumption that it should be payable quarterly. We cannot infer any such intention from that stipulation; nor do we find any authority for such a construction. Consequently the plaintiff's claim fails. Rule absolute.(*c*)

(*a*) May 26th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.
(*b*) See *Gibson* v. *Kirk*, 1 Q. B. 850, 856, 7.
(*c*) Reported by H. Merivale, Esq.

BOWNES and Others v. MARSH.

To a declaration on a bastardy bond in 100*l.*, conditioned to indemnify the parish against expenses of maintenance, from time to time, of an expected bastard child: breach, that defendant had suffered and permitted the child to be maintained at the expense of the parish; the defendant pleaded that the child was past the age of nurture, and was under the control of the parish officers; that he, defendant, was able and willing to provide for the child without the assistance of the parish, and requested the parish officers to deliver the child over to his care and management, which they refused to do, and thereby the child had been provided for by the parish officers voluntarily and of their own wrong. *Held*, after verdict, that the plea contained an answer to the action, though it did not aver that the child was willing to go to the putative father.

Held, also, that such bond required a stamp of 1*l.* 15*s.* as being a Bond "not otherwise charged," under stat. 55 G. 3, c. 184, Sched. Part. I. *Bond;* and not 25*l.*, as a bond to secure the repayment of money to be advanced, &c., or which might become due on an account current, and to an amount "uncertain and without any limit."

DEBT on a bond, given, on the expected birth of a bastard child, by defendant to the churchwardens and overseers of the poor of the parish of Mansfield, Nottinghamshire, dated February 25th, 1825; conditioned to indemnify the churchwardens and overseers and inhabitants of and from all incumbrances, costs, charges, &c., by reason of the birth, education and maintenance of a certain child, until such child should have obtained a settlement out of the parish. Breach, that, after the birth, defendant did not nor would indemnify, &c., but on the contrary thereof afterwards, to wit, on 5th June, 1845, and from thence until the commencement of this action, suffered and permitted the said child to be maintained and provided for at the expense of the inhabitants of the said parish; whereby they, and the plaintiffs as churchwardens and overseers, had *incurred great costs, &c., amounting, &c., about the maintenance of the said child, &c.

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Pleas: 1. Non est factum. 2 and 4. Pleas leading to issues in fact, not now material. 3. That after the making of the bond, and before the accruing of the causes of action, and before the said 5th June, 1845, and before the commencement of the suit, to wit, on, &c., the said child had attained a certain age, to wit, twenty-one years, and was then past the age of nurture. That the said child at the time of making the request thereinafter mentioned was, and from thence hitherto had been, under the power and control of the overseers and churchwardens of the said parish for the time being. That defendant was then, to wit, on the day and year aforesaid, and thence hitherto had been and still was, able and willing wholly and completely to keep and maintain and provide for the said child, without the aid or assistance of the said parish, and then and before any of the said times in the introductory part of the said plea mentioned, to wit, on, &c., requested and desired the then overseers of the said parish, and often afterwards requested the plaintiffs since they became and were such alleged overseers as in the declaration mentioned, to deliver over the said child to his the said defendant's care and management, whereby the said child might have been provided for without

being chargeable to the said parish; which the plaintiffs wholly refused and still did refuse to do: and the said child had thereby during all the time in the said supposed breach mentioned been provided for at the expense of the said parish by the plaintiffs, and the respective overseers and churchwardens for the time being, voluntarily and of their own wrong: and that, if the inhabitants, &c., *and said plaintiffs, as churchwardens and overseers, or any or either of them, had been [*789 at all damnified by reason of the birth, education or maintenance of the said child, or by reason of any charge touching the same, the said overseers, churchwardens and inhabitants had been so damnified by their own voluntary act and of their own wrong. Verification.

Issue joined on the first, second and fourth pleas.

Replication to the third plea: that defendant did not request or desire the overseers of the said parish or the plaintiffs to deliver over the said child to his the defendant's care and management, as in the said plea alleged. Issue thereon.

On the trial, before PATTESON, J., at the Nottinghamshire Summer assizes, 1846, the plaintiffs, in support of the first issue, proved the execution by defendant of a bond, dated 28th February, 1825, whereby he was bound to four persons named, described as the two churchwardens and two overseers of the poor of (and in trust for the inhabitants of) the parish of Mansfield, in 100*l*., to be paid to the said, &c. (the four), or one of them, or their certain attorneys, successors or assigns. The condition was as follows.

"Whereas Mary Cowley, single woman, servant to the above bound John Marsh, hath declared that she is with child, and that the said child or children is or are likely to be born a bastard or bastards within the said parish, and that the said above bound J. M. is the father of the said child or children, to which declaration or charge he hath submitted, and hath voluntarily agreed to indemnify the parishioners of the said parish of Mansfield against all expenses that may be incurred *by reason of the said child or children's birth, education and main- [*790 tenance, according to the true intent," &c., "of the underwritten condition of the above obligation: Now the condition of the above written obligation is such that, if the said J. M., his heirs, executors or administrators, do and shall, from time to time and at all times hereafter, fully and clearly indemnify and save harmless as well the above named churchwardens and overseers of the poor of the said parish of Mansfield, and their successors for the time being, as also all and singular the other inhabitants of the said parish which now are or hereafter shall be, for the time being, of and from all incumbrances, costs," &c., "for or by reason of the birth, education and maintenance of the said child or children, and of and from all actions, suits," &c., "touching or concerning the same, until such child has or children have obtained a settlement or

settlements out of the said parish of Mansfield:" then the obligation to be void; otherwise to remain in full force.

To this bond there was a stamp of 1*l.* 15*s.* It was objected, on the part of the defendant, that the stamp was insufficient; but the learned Judge overruled the objection, reserving leave to move for a nonsuit: and a verdict was found for the plaintiffs on all the issues except that joined on the replication to the third plea; and on this there was a verdict for the defendant.

In Michaelmas term (November 3d), 1846,

Whitehurst moved for a nonsuit, pursuant to the leave reserved. The stamp of 1*l.* 15*s.* seems to have been affixed on the supposition that this instrument falls under the head, in stat. 55 G. 3, c. 184, Sched. Part I,

*791] *of "Bond in England," "of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty—1*l.* 15*s.*" But, inasmuch as the condition is for repayment to the parish officers of whatever they expend, and is in the nature of an indemnity upon an account current, the title applicable is rather "Bond in England" "given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit—25*l.*" This clause is not restricted by the words which follow: "And where the moneys secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum —the same duty as on a bond for such limited sum." For, though the penalty of the bond is only 100*l.*, upon which the stamp is 1*l.* 10*s.*, that does not limit the security, since if the defendant, by continued payments, indemnified the overseers to any amount whatever, and then made default upon subsequent expenses, the bond might be enforced: the condition, therefore, not the penalty, is that which must be looked to as limiting the security; *Scott* v. *Allsopp*, 2 Price, 20.

Lord DENMAN, C. J. It appears to me that the clause on which you rely applies merely to the case of money advanced to the obligor.(*a*)

COLERIDGE and WIGHTMAN, Js., concurred.

*792] *ERLE, J. In *Lopez* v. *De Tastet*, 8 Taunt. 712, it was held that a bond given to secure damages to be recovered on a new trial, and costs, was properly stamped with a 1*l.* 15*s.* stamp, as coming under the head of a bond "not otherwise charged." Rule refused.

In the same term,

Humfrey, for the plaintiffs, obtained a rule nisi for judgment non obstante veredicto on the third plea. The case was set down for argument in the special paper. The points stated on behalf of the plaintiffs were, that, for all that is stated in the third plea, the maintenance of

(*a*) See *Frith* v. *Rotherham*, 15 M. & W. 39.

the child by the parish officers was not voluntary on their part, inasmuch as it is not alleged that the child was willing to be maintained by her putative father, or by any other person or in any other manner than by the parish officers. And that the defendant, being the putative father of the said child, was not entitled in law to the custody for the purpose of the care and management of the said child without her consent thereto, which consent is not alleged in the said plea. In this term,(*a*)

G. Hayes showed cause. It is sufficient for the purpose of this argument to establish that the putative father has a limited right to the care and custody of his child, without going so far as to contend that his rights in this respect are coextensive with those of a *legitimate father, which is denied in *Rex* v. *Soper*, 5 T. R. 278, and *Rex* v. *Moseley*, 5 East, 224.(*b*) He has a right, at all events, [*793 as against the parish officers, who, if they persist in keeping and maintaining the child contrary to the father's request, maintain it by their own voluntary act. An indemnity bond may be satisfied either by preventing the loss, or by making it good: and *Simpson* v. *Johnson*, 1 Douglas, 7, shows that parish officers cannot recover in respect of voluntary payments made by them for the maintenance of a bastard child; which appears to be also admitted in *Hays* v. *Bryant*, 1 H. Bl. 253. [COLERIDGE, J. But the question here is, whether, when a child is beyond the age of nurture, the parish officers are bound to give it up to the putative father from whom they have taken a bond to maintain it. Suppose the case of a father whose conduct is notoriously infamous?] It is sufficient for the present purpose to contend that primâ facie the parish cannot charge the father with the maintenance on his bond. [COLERIDGE, J. It seems to me that your argument must assume some relation between the father and child beyond what the law acknowledges in the case of illegitimacy.] The bond itself implies some such relation. It is not conditioned to pay for the maintenance at all events, but to "indemnify and save harmless" the parish from all incumbrances and costs by reason of the birth and maintenance. That implies a duty in the parent to maintain. As to the case supposed: it might be equally possible that in the case of a legitimate father who was notoriously unfit or unable the parish might refuse to deliver up a child to him. In *Richards* v. *Hodges*, 2 Saund. 82, *the argument of counsel was, [*794 that it was a voluntary act on the part of a parish to put a child to nurse when the putative father offered to maintain it; and this was not denied; but judgment went for the plaintiff on account of an error in pleading. The right of a putative father to take the child for the purpose of maintenance was recognised in *Burwell's Case*, 1 Ventr. 48, and *Sherman's Case*, 1 Ventr. 210. In *Rex* v. *Cornforth*, 2 Strange,

(*a*) Friday, June 4th. Before Lord DENMAN, C. J.. PATTESON, COLERIDGE and ERLE, Js.
(*b*) Note (*a*) to *Rex* v. *Demanneville*.

1162,(a) it was held that the prohibition of stat. 4 & 5 Ph. & M. c. 8, s. 8, against unlawfully taking away any maid or woman child unmarried, within the age of sixteen years, from the possession and against the will of the father or mother extends to a bastard child in the care of the putative father. The very foundation of the legal claim on the father for maintenance rests, in effect, on the right of parentage: which is equally recognised by the decisions against incestuous connections with illegitimate kindred; *Hains* v. *Jeffel*, 1 Ld. Raym. 68, S. C. Comberbach, 356. In *Newland* v. *Osomond*, Sayer's Rep. 93, S. C. 1 Bott. 459, pl. 514, a plea like the present was held good by the majority of the Court: and, although FOSTER, J., doubted, yet from the report in Sayer it should rather seem that he surrendered his doubt before the judgment of the Court was given. The plea, therefore, appears to have been considered good, until doubts arose whether a putative father had a right to the custody of his child; *Strangeways* v. *Robinson*, 4 Taunt. 498. *Pope* v. *Sale*, 7 Bing. 477, was decided on a different point.

Macaulay, contrà. It is not denied on the part of the defendant that
*795] the child, being above the age of *nurture, could exercise a choice whether to remain with its putative father or not; and that appears from the case *In re Lloyd*, 3 Man. & G. 547. But, that being so, it follows that if the child chose to remain with the parish officers the bond continued in force. Therefore, there ought to have been an averment that the child was willing to go. This cannot be disputed, except on the assumption that the putative father has an actual right to the custody and maintenance of a child above the age of nurture; which is untenable; because in judgment of law he is "nullius filius;" Co. Litt. 123 *a*: and occasional dicta of judges to the contrary (such as that of WRIGHT, J., in *Rex* v. *Cornfort*, 1 Bott. 458, pl. 513, which was not necessary to the decision of the case) cannot be admitted against this general principle. The plea is also bad, inasmuch as notice to the overseers of the defendant's ability or willingness to maintain the child is not averred. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (June 12th), delivered the judgment of the Court.

In a declaration on a bond of indemnity against the expenses of maintaining a bastard, the breach alleged is that the defendant suffered and permitted the child to be maintained at the expense of the parish. The defendant pleaded, and the jury in effect found, that, after the child was past the age of nurture, and while she was under the power and control of the overseers, he was able and willing to maintain her without assistance, and requested the overseers to deliver her over to him, whereby she might have been maintained; but they refused to do so,
*796] and chose to maintain the child *at the expense of the parish. The plaintiffs have moved for judgment notwithstanding this ver-

(a) See S. C. (more fully) as *Rex* v. *Cornfort*, 1 Bott. 458, pl. 513, 6th ed.

dict, contending that the facts in the plea were no defence without adding that the child was willing to go to the defendant to be maintained by him. But we are of opinion that this objection ought not to prevail. As the plea alleges that the child was under the power and control of the plaintiffs, and they refused to deliver her over to the defendant according to his request, we think that the plaintiffs have no right to assume, after verdict, that the child was unwilling to go to the defendant: and, if the child was indifferent and passive, the facts in the plea show that the defendant did not suffer and permit the child to be maintained by the parish; he did not suffer and permit that which was contrary to his express request. Rule discharged.(*a*)

(*a*) Reported as to the motion for judgment non obstante veredicto, by H. Merivale, Esq.

The QUEEN *v.* The Justices of CARMARTHENSHIRE. *June* 12.

A coroner is not entitled to any remuneration for holding an inquest, unless, in the judgment of the Court of Quarter Sessions, it was proper that such inquest should have been held; and the Court of Queen's Bench will not review the judgment of the Sessions on this point.

But disbursements made by the coroner, under stat. 7 W. 4 & 1 Vict. c. 68, after the termination of the inquest, must be repaid to him, whether it was proper that such inquest should be held or not; and the sessions have no power to disallow them.

PASHLEY, in last Easter term, obtained a rule nisi for a mandamus, directed to the justices of the county of Carmarthen, commanding them, in Quarter Sessions assembled, to make an order on the treasurer of the said county for payment to Mr. George Thomas, as one of *the coroners of the said county, of the sum of 7*l.* 3*s.* 8*d.*, claimed [*797 by him for his fees, mileage and disbursements in respect of two several inquests held by him within the district of the county for which he was coroner.

It appeared from the affidavit of the coroner, on which the rule was obtained, that, on 2d February last, one of the superintendents of the county police gave him notice that a labouring man had come to his death suddenly in consequence of his fingers having been chopped off by a chaff cutter, and that the deceased was during his last illness in receipt of parish relief, and attended by the medical officer of the parish, and that there was a rumour that the deceased had not received proper medical attention and treatment. The coroner also deposed that, on the inquest, he, at the instance of the jury, required the medical officer's attendance: that the verdict of the jury was that the deceased died of locked jaw, produced by injuries to his fingers, caused by a chaff cutter: that he, the coroner, before the inquest, considered that there was some doubt, under all the circumstances, whether the medical treatment of the deceased had been skilful and judicious; but that it appeared from the evidence taken on the inquest that the medical officer was free from all blame.

The other inquest had been held on the body of a girl aged four years, whose death was stated to the coroner to have been occasioned by her clothes accidentally taking fire. It appeared upon the inquest that the deceased was suffered by her parents to be alone in a room in which there was a fire, and from which no precaution had been taken to defend her. The verdict of the jury was, that the child was accidentally burnt

*798] to death. It was stated, in evidence, that about *Michaelmas last another child of the same parents was accidentally scalded, and died a few weeks afterwards, and that the coroner was never informed of the death of such last mentioned child, or of the accident that had happened to it. It was further stated, on the coroner's affidavit, that during the year last past he had held twenty-seven inquests, and that of such number seven were held on children who had been burned to death. That such deaths were, in the coroner's belief, very frequent in the county; that in six out of seven of the last mentioned cases the deaths resulted from some degree of neglect on the part of the parents, or others having the custody of the children: and that in some of the cases the neglect was so gross as to render it doubtful to the coroner whether it did not amount to manslaughter.

As to both inquests, the coroner stated that, from the information given him, he conceived it to be his duty to hold such inquests.

The affidavit furnished the particulars of the coroner's claim, which consisted of charges for money paid to witnesses, a fee of 1*l.* 1*s.* 0*d.* to a medical witness in the first case, and also money paid for hire of room, and to the jurors, and for the coroner's own fees, mileage, &c. The whole claim had been disallowed by the Sessions, on the ground that they did not consider either inquest necessary. In this term,(*a*)

Sir *J. Jervis*, Attorney General, and *Crompton* showed cause; and *Pashley* supported the rule.

*799] *The course of argument,(*b*) as to the points decided, will sufficiently appear from the judgment. It was agreed that the matter should be disposed of on the rule. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

Two questions arise in this case: the first, whether, when the coroner of a county has held an inquest, paid a medical man his statutable fee for attendance, and discharged the costs of the jury and witnesses, the court of Quarter Sessions has any discretion as to allowing or disallowing to him his own fees, and the repayment to him of those sums expended, assumed to be reasonable in amount; the second, whether, if

(*a*) May 31st. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

(*b*) *Pashley* impugned the authority of *Rex* v. *Justices of Kent*, 11 East, 229, and referred to 2 stat. 4 Ed. 1 (*De officio coronatoris*), to the dictum of BULLER, J., in *Rex* v. *The Justices of Norfolk*, Nol. Rep. 141, and to several old authorities, to show that the coroner, under the circumstances stated in the text, was bound to hold the inquests; and he contended that the coroner would have been liable to indictment and attachment if he had not held them.

the Quarter Sessions has such discretion, this Court has any controlling power over their exercise of it.

In examining into the first of these questions, it is quite unnecessary to go into the ancient law respecting the office of coroner, or the mode in which his remuneration was provided when first it was thought right or consistent with its high dignity to assign him any; for his present payments depend entirely on modern statutes. Of these the first is the 25 G. 2, c. 29. This is an act, among other things, "for giving a proper reward to coroners for the *due* execution of their office," and commences, with stating, in the preamble, that the fee given by stat. 3 H. 7, c. 1, was not an adequate reward for the general execution of the office; it then enacts that, to the end "that coroners may be *encouraged to execute their office with diligence and integrity," a [*800 certain fee and mileage shall be paid them for every inquisition (except in respect of bodies dying in prison) which shall be duly taken. The 2d section provides for the case of persons dying in prison, and enacts that, for every inquisition which shall be *duly* taken in such case, so much money, not exceeding 20*s.*, shall be paid as the justices in General or Quarter Sessions shall think fit to allow as a recompense for the labour, pains and charges of the coroner in taking such inquisition. In the first case the sum is fixed, and the same, on every occasion, the mileage alone being to be ascertained; in the latter the sum is to be determined by the justices within the limit of 20*s.*; in both cases the legislature contemplates reward and remuneration for services rendered, and in both speaks of inquisitions *duly* taken. The due taking of the inquisition seems to us a condition precedent to the being entitled to the reward; if the payment be made as of course without the control of any one, and without consideration whether the inquisition was duly taken, the act, instead of operating as an encouragement to the execution of the office with diligence and integrity, might lead directly to its being performed negligently and dishonestly. And "due taking" implies not only care and diligence in the taking, but the taking under such circumstances as make it proper that it should be taken. This, in substance, was the view taken of this statute by this Court in *Rex* v. *Justices of Kent*, 11 East, 229, with which we entirely concur. And, if this view be correct, it is obvious that, in the first instance at least, the justices in sessions, who are to make the order for payment, must exercise a *discretion [*801 in determining whether the coroner's conduct has been such that the order ought to be made.

But, if they must in the first place exercise a discretion, the second question made arises, and is of easy solution. The act which empowers them to exercise it gives no appeal to this Court: and it is an inflexible rule that there is no direct appeal to this Court from the Quarter Sessions, unless it is expressly given by statute. And this general rule of law operates most conveniently in this case and the like. Whether or

not an inquest has been duly taken is a question depending on a variety of circumstances, which can hardly be made to appear on affidavits so satisfactorily as on an oral examination by the justices, either in committee or in court; and, assuming the absence of any corrupt bias, they are so much more likely to come to a right conclusion on such an examination than we could be on affidavits, that we should be very unwilling to take the review of their decision. If, indeed, there were any ground for imputing a corrupt purpose, there may be an inherent power in this Court which would enable us indirectly to compel the sessions to do justice; but, without expressing our entire concurrence in their present decision, we say, as was said in the case before referred to, we do not "see any occasion to interfere" with it.

But it was contended that, whatever might be decided with regard to the coroner's own remuneration under stat. 25 G. 2, c. 29, yet, as to the different sums which he has paid out of his own pocket, under different subsequent statutes, these were compulsory payments by him, and, as to these, by the statutes in question he is entitled to be reimbursed, and the sessions have no discretion. These are, a fee of 1*l.* 1*s.* to a medical witness *summoned by the coroner on one of the inquests, the hire of the room in which the inquests were held, payments of 1*s.* to the jurors, and some small incidental and necessary expenses. These charges are either fixed in amount by statute, or their maximum is limited by an order of sessions; and the coroner is compelled to pay them, by stat 7 W. 4 & 1 Vict. c. 68, s. 1, "immediately after the termination of the proceedings." The statute goes on to enact, that the "sums so advanced and paid shall be repaid to the said coroner in manner hereinafter mentioned." The manner is stated in the third section: within four months after holding any inquest, the coroner is to lay a full and true account before the justices in sessions, accompanied by such vouchers as under the circumstances they shall think reasonable to require, and they may, "if they think fit, examine the said coroner on oath as to such account," and, "on being satisfied of the correctness thereof," they shall make an order on the Treasurer of the county for payment to him, "not only of the sum due to him on such account, but also of a sum of six shillings and eight pence for every inquest holden by him as aforesaid, over and above all other fees and allowances to which he is now by law entitled." Perhaps a distinction might be taken between the summoning of a medical witness, and the other expenses now in question, on the score of necessity; but the propriety of requiring the presence of the medical attendant of the deceased in every case in which the death is proper to be inquired into at all is so unquestionable as almost to amount to a necessity; and it is better perhaps to class it among the necessary expenses of a proper inquest. Now the statute has no words in it like those of stat. *25 G. 2, c. 29; and, although the justices are empow-

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*803]

ered to examine the coroner on oath, the context seems to show that it is rather with regard to the expenses having been actually incurred and discharged, and the rate of payment, where he has any discretion, being proper, than as to any other circumstances. This does not, indeed, conclude the question. In this statute, and the preceding one of 6 & 7 W. 4, c. 89, which are statutes for securing the attendance of medical witnesses, and providing for the payment of the expenses of inquests, it was not to be expected that anything would appear as to the propriety of holding the inquest. The bailiff who summoned the jurors, the jurors who attended upon the precept, the witnesses who appeared when called on, were all bound to obey the authority under which they acted; and their remuneration could not justly be dependent on the propriety of the coroner's determination to hold the inquest. So also the householder who let his room for the purpose of the meeting could not be expected to inquire whether the coroner did right or wrong in holding it. In *these* statutes, therefore, anything which raised that question would have been quite out of place. And this consideration seems to furnish the ground for deciding this part of the rule. By the law, as it stood before these statutes, it appears by the preamble to stat. 7 W. 4 and 1 Vict. c. 68, these charges, excepting that for medical witnesses, were not certainly provided for by law, and were usually, without any lawful authority, paid out of the poor rate; the charge for medical witnesses was by stat. 6 & 7 W. 4, c. 89, directed to be so paid under an order from the coroner. When the coroner himself was not the person who paid the charges, but the payment was *made by the overseers under the coroner's order, whether issuing by usage or under the statute, it is clear [*804 that the overseers could not resist the payment on the ground merely that the coroner *ought* not in the exercise of his discretion to have held the inquest; for the coroner's act was just as binding, his legal authority as great, the finding of the inquisition as valid, where there was indiscretion in holding the inquest as where it was most proper to do so. If this were so before the statute, it seems to us that the state of things is not altered now, merely because for convenience the coroner is made to pay the charges in the first instance; he puts nothing into his own pocket by so doing: he is merely the agent of the county treasurer in paying the money, for which before the statute he used to make an order that was obeyed by the overseer: and, as the payment is equally a valid and legal payment in respect of the parties to whom it is made, so he is entitled to be repaid by the justices when they are satisfied of the correctness of the account.

And this conclusion upon the whole meets the justice of the case as well as it agrees with the natural construction of the statutes. All temptation to hold inquests unnecessarily is removed by making the coroner's own remuneration depend on the decision of the justices, formed on an examination of all the circumstances. But those who

obey his authority, as they must do, in giving their attendance and taking part in any inquest, have their remuneration certain; while, if he errs through inconsideration or officiousness, he is not punished to such an extent as might tend to make him improperly slow in the execution of his office, which might be the case if he held every inquest at the peril,
*805] not merely *of losing his own time and labour, but being saddled with all the expenses of the inquiry.

The rule, therefore, will be absolute as regards the expenses paid by the coroner, and discharged as to his own allowances.

Rule absolute accordingly.(a)

(a) Reported by H. Davison, Esq.

WOOD v. MYTTON.

Stat. 3 & 4 Ann. c. 9, s. 1, extends to a promissory note payable to the maker's own order, so as to make him liable, upon the note, to an indorsee.

ASSUMPSIT. The first count of the declaration stated that the defendant, on 10th March, 1845, made his promissory note in writing, and thereby promised to pay to his own order 600*l.* for value received, four months after the date thereof (which period had elapsed before the commencement of this suit), and then indorsed the note to one Joseph Clarkson, who then indorsed the same to the plaintiff: and the defendant then promised the plaintiff to pay him the said note according to the tenor and effect thereof, and of the said indorsements, &c.

Pleas (among others): 1. That defendant did not make the note, modo et formâ. 2. That defendant did not indorse the note, modo et formâ. Issues thereon.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after last Trinity term, the plaintiff obtained a verdict. *Shee*, Serjt., in Michaelmas term last, obtained a rule nisi for arresting the judgment on the ground that the instrument declared on was not a negotiable instrument within stat. 3 & 4 Anne, c. 9, s. 1.

*806] *In this term,(a)

M. Chambers and *Wordsworth* showed cause. The instrument is negotiable, either as a bill of exchange or as a promissory note. Promissory notes were, in truth, negotiable before stat. 3 & 4 Anne, c. 9, which was passed in consequence of *Clerke* v. *Martin*, 2 Ld. Raym. 757, *Potter* v. *Pearson*, 2 Ld. Raym. 759, and *Buller* v. *Crips*, 6 Mod. 29, cases decided by this Court in the time of Lord HOLT. The statute itself does not say that such instruments were not previously negotiable, but merely that "it hath been held" that they were not so. The courts ought to take notice of usages adopted by merchants in furtherance of

(a) June 4th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

traffic; *Pierson* v. *Pounteys*, Yelv. 135: and the statute itself is to be construed liberally and according to the usage of merchants; *Stone* v. *Rawlinson*, Willes, 559, 561; *Rawlinson* v. *Stone*, 3 Wils. 1; *Brown* v. *Harraden*, 4 T. R. 148; *Smith* v. *Kendall*, 6 T. R. 123. Even Lord HOLT, in *Buller* v. *Cripe*, already cited, said that, "if the indorsee had brought this action against the indorser it might peradventure lie; for the indorsement may be said to be tantamount to the drawing a new bill for so much as the note is for upon the person that gave the note." It is immaterial, after verdict, whether the form of this declaration is free from objection. The declaration describes the instrument as a promissory note: but, whether it is a promissory note or a bill of exchange, circumstances are stated which show that the plaintiff is entitled to judgment. No particular *words [*807 are essential to the character of a bill or note; *Morris* v. *Lee*, 2 Ld. Raym. 1396. In *Vere* v. *Lewis*, 3 T. R. 182, a bill was drawn by L. & Co. on defendants, payable to a fictitious person, and purported to be indorsed by such person to the plaintiffs; and the Court thought the indorsees might recover on a count stating that the bill was payable to bearer, as the circumstances were known to all concerned in drawing the bill: and this view was confirmed in *Minet* v. *Gibson*, 3 T. R. 481, and *Gibson* v. *Minet*, 1 H. Bl. 569. The defendant in this case is, at all events, chargeable in respect of his indorsement, which is in the nature of a new bill or note; *Hodges* v. *Stewart*, 1 Salk. 125, *Harry* v. *Perrit*, 1 Salk. 133, *Heylin* v. *Adamson*, 2 Burr. 669, 676. In many cases it appears that the drawer and drawee were the same person; *Stark* v. *Cheesman*, Carth. 509, *Robinson* v. *Bland*, 2 Burr. 1077, *Roach* v. *Ostler*, 1 Man. & Ry. 120: and an instrument may be a good bill of exchange notwithstanding; *Magor* v. *Hammond*,(a) and dictum of PATTESON, J. in *Davis* v. *Clarke*, 6 Q. B. 16, 19. In such cases, and also in cases like *Block* v. *Bell*, 1 M. & Rob. 149, where it is ambiguous whether an instrument is a bill or note, it may be difficult to say how the instrument should be described; but the courts have always endeavoured to give some effect to such an instrument. The defendant will rely on the preamble to the statute of Anne, and on the first clause of the enacting part of sect. 1, from which it may be argued that the statute applies to such notes only as are made by "any person" payable to any "other person;" and on **Flight* v. *Maclean*, 16 M. & W. 51, where this view of the statute appears to have been taken, [*808 and to have been applied to an instrument like the present. But the point appears not to have been argued for the plaintiff in that case, because it was supposed not to be properly raised by the demurrer to the first count of the declaration; and the plaintiff was, probably, content with judgment on the second count. An instrument such as that in question is indeed a note payable to some "other person," so soon as it

(a) Cited in *Harvey* v. *Kay*, 9 B. & C. 364.

is indorsed, and is therefore entitled to all the privileges given by the statute. This may account for the omission of the word "other" in the second enacting clause. The instrument here may be likened to a note given by wife to husband, which would be void, and yet, if indorsed over by husband, would be good as between him and the indorsee; *Haly* v. *Lane*, 2 Atk. 181.

Shee, Serjt., contrà. The words of the statute and the case of *Flight* v. *Maclean* are decisive against the plaintiff. The legislature intended to put promissory notes on the same footing with bills of exchange, in furtherance of the purpose to which bills of exchange are adapted. That purpose is emphatically exchange; and what operation of exchange is effected by a person either paying money, or promising to pay it, to himself? [Lord DENMAN, C. J. The language of the section is very peculiar. The first enacting clause provides that all notes "made and signed by any person or persons," &c., "whereby such person or persons" "doth or shall promise to pay to any *other* person or persons," &c., shall be payable to such person or persons to whom the *same are made payable. The next clause, which relates to the negotiability of such notes, drops the word "other:" it says, "and also every such note payable to *any* person or persons" shall be indorsable over like a bill of exchange.] The word "such," there, is material. The statute must contemplate some instrument which creates a contract, and resembles a bill of exchange. [PATTESON, J. Whatever may be the case with respect to a note like this before indorsement, may it not, as soon as it is indorsed, come within the statute, either as a note payable to bearer, if it is indorsed in blank, or as a note payable to the person designated, if it is indorsed in full?] If there is no contract after the maker has signed his name once, it is difficult to see how his signing his name a second time can make any difference. *Cur. adv. vult.*

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Lord DENMAN, C. J., in this term (June 12th), delivered judgment.

In this case the defendant contends that stat. 3 & 4 Anne, c. 9, s. 1, does not extend to the promissory note set out in the declaration, which is not payable to any other person, but only to the order of the maker, whereas the notes described in the preamble, and the first clause, of the first section of that statute, are notes made payable to some other person than the maker, and the same description is alleged to apply to the subsequent clauses of that section, as the notes therein mentioned are "such" notes as had been before mentioned. The plaintiff has contended that the description of the payee given in the first of those clauses is not adopted in those that follow, relating to *indorsement, and that under the last of those clauses his right to sue in this action is maintained.

*810]

The legislature appears to have intended to give to all promissory notes the validity of bills of exchange; and no reason has been assigned why any promissory notes containing a promise to pay should be invalid,

so as to enable the maker to commit a fraud. We have, therefore, considered the statute closely, to see if there are not general words of enactment, unrestricted to the particulars mentioned at its commencement, which would effect the intention above mentioned; and it appears to us that there are. The first section consists of the preamble, and four clauses of enactment. The preamble, after stating the decisions that notes, whereby the maker promised to pay any other person or his order money, were not valid by the custom of merchants, recites the expediency of giving to such notes the validity of inland bills of exchange. Then the first of the four clauses enacts that all notes in writing, made after a given day, signed by the maker or by certain agents of the maker, therein described, whereby the maker promised to pay to any other person, or his order, *or to bearer*, money, should be due and payable to the persons to whom they were made payable. This clause contains first a description of promissory notes by certain requisites, and then a description of the person to whom they are payable; and it includes notes payable to bearer, which are not strictly such notes as are mentioned in the preamble, but an addition thereto. If it is confined to notes not indorsed, it has provided for all payees that can claim; and the restricted description of the payee operates no restriction in fact. The three subsequent clauses, that is the *second, third and fourth, relate to the indorsements of notes. The second enacts [*811 that every *such* note payable *to any person* or persons, his or their order, shall be indorsable over as a bill of exchange. This clause, by the words "every such note," adopts the description of the note in the first clause exclusive of the payee, and adds a different description of payee, omitting to specify bearer, but extending to any person. It includes, therefore, in terms, notes payable to the maker or his order, as well as notes payable to other persons; and, if the former description of payee was intended to be incorporated under the word "such," the additional description of payee would be not only superfluous but incorrect. The third clause enacts that the person to whom such money shall be by such note made payable may sue the maker. The fourth clause enacts that any person to whom *such* note that is payable to any person or "persons," "his, her, or their order," is indorsed, may sue the indorser or maker as in case of bills of exchange. Under this clause the plaintiff, as indorsee, sues; and the construction above explained, in respect of the former description of the note being adopted with a new description of payee, applies here; and any indorsee of a note payable to order is included. Other answers to the contention of the defendant were offered for the plaintiff; but it is not necessary to consider them if this construction of the statute is correct: and, as thereby the words are applied in their ordinary sense, and effect is given to all of them and justice is promoted, we adopt it for the plaintiff.

We were pressed with the decision in *Flight* v. *Maclean*, 16 M. & W.

*812] 51, in which the judgment was for the *defendant upon a count similar to the present. But, as the construction of the statute here stated was not brought under the attention of the Court, and as the judgment was for the plaintiff on the second count, so that he recovered on the note though he failed on one count, and as the decision would render void transactions that have been long considered valid, and operate only to protect a broken promise, and to enable a debtor to defeat a just creditor, we feel constrained to give our judgment upon the different construction of the statute which we have for this reason explained at length. Judgment for plaintiff.(a)

(a) See *Hooper* v. *Williams*, 2 Exch. 13, and *Brown* v. *De Winton* (Trin. Vac. 1848), 17 L. J. (N. S.) Com. Pl. 281.

Reported by H. Davison, Esq.

The QUEEN *v.* The Inhabitants of CRONDALL. *June* 10.

On application for an order of removal, the pauper was sworn before the justices; and her evidence was taken down in writing by the attorney for the parish applying for the order, who acted in that character only, and not as clerk to the justices: the writing was signed by the pauper; but no jurat was added to the writing; nor was it signed by the justices. At a subsequent hearing, the pauper was again examined, and her evidence taken down in writing; to this writing a jurat was added; and it was signed by the justices: and a copy was sent to the parish to which the removal was made. *Held*, that it was not necessary, under stat. 4 & 5 W. 4, c. 76, s. 79, that a copy of the former writing should be also sent.

Relief given to a pauper by order of the board of guardians of a union, on account of a particular parish therein, is evidence, on appeal by such parish against an order of removal, that the relief was given by its authority.

ON appeal against an order of justices for the removal of Martha Croucher and her children from the parish of Elstead in Surrey to the parish of Crondall in Hants, the Sessions confirmed the order, subject to a case. The material points arose on the following examinations, set forth in the case.

*813] *"The examinations of Martha Croucher, lately residing in the parish of Elstead in the county of Surrey, and now an inmate of the workhouse of the Hambledon Union in the said county, widow, touching the place of her settlement and the settlement of her eight children, taken upon oath before us, two of Her Majesty's justices of the peace acting in and for the said county of Surrey, the 6th day of March, 1845." "I am about thirty-eight years of age, and am the widow of James Croucher, late of the parish of Elstead in the said county of Surrey, deceased." The examination then stated that the pauper was married to her said late husband at the parish church of Crondall in 1826, and that they constantly resided at Crookham in that parish from the time of their marriage until the latter part of 1837, the husband renting and occupying a house and land, &c. "During the time I and my husband lived at Crookham, we were several times relieved during the winter months by the parish of Crondall with an

allowance of bread; and I and my children were once relieved by being taken into the Union House of the Hartley Wintney Union, of which Union the parish of Crondall aforesaid was then and is now part; where we remained six or seven days without any endeavour to remove my husband and family to another parish. I have by my said husband eight children," &c. (stating names and ages). "In the year 1838, my husband went to live in the said parish of Elstead; he was taken ill and unable to work; this was in the latter end of 1839, or the beginning of 1840. In consequence, I applied to Mr. Lodge, Mr. Rowland, and Mr. Chandler, of Crondall parish, for relief; they told me I must apply to the parish where I lived, and that they must settle it with that parish. I *accordingly applied to Mr. George Woods, the relieving officer of the Hambledon Union, and he relieved my husband several [*814 times during his illness with money. My husband died in the month of June last; at the time of his death, he and his family were living in Elstead parish. Very soon after his death I applied to the overseers of Elstead for relief. I was at first relieved by them with money and bread, and afterwards was removed with my said children from Elstead parish, in which we were then living, to the poor house of the Hambledon Union, where we are now supported at the expense of Elstead parish, which forms part of the Hambledon Union. I continued to reside with my said children in the parish of Elstead from the time of my husband's death till we were removed to the Hambledon Union House."

"The examination of Samuel Andrews, of," &c. "I am one of the relieving officers of the Hartley Wintney Union. The parish of Crondall forms part of the said Union, and is situate in the district of the said Union for which I am the relieving officer. I produce a letter hereto annexed, which I received from George Woods, the relieving officer of the Hambledon Union in the county of Surrey, containing an account of the relief given by him to James Croucher and his family, amounting to 2*l.* 2*s.* 9*d.*, while resident in the parish of Elstead in the said county of Surrey; and an application for the payment of the amount.(*a*) In consequence I made a report of the application to the board of guardians of the Hartley Wintney Union. I produce the application and report book for my district of the said Hartley *Wintney Union, commencing the 25th day of December, 1836, [*815 and ending the 25th of December, 1840; this contains an entry of the application by James Croucher for relief, and an order for payment of the said sum of 2*l.* 2*s.* 9*d.* made the 27th of March, 1840, and signed with the initials of James Brooks, the clerk of the guardians of the said Union. I also produce the weekly out door relief list of my district of the said Hartley Wintney Union, commencing the 25th December, 1838, and ending the 24th day of June, 1840. This book

(*a*) The letter, in substance as above, was annexed to the examination.

cortains an entry, for the quarter ending June the 24th, 1840, of the payment to James Croucher, his wife and seven children, of the said sum of 2*l.* 2*s.* 9*d.*, for the amount of relief given by the said George Woods to the said James Croucher and his family, in a letter addressed," &c., dated 14th May, 1840.(*a*) "The relief so given the said James Croucher is charged in the said out door relief list to the said parish of Crondall."

"The examination of George Woods, of," &c. "I was relieving officer of the Hambledon Union in the county of Surrey, in the years 1839 and 1840. Elstead parish forms part of this Union. In the latter part of the year 1839, or the beginning of the year 1840, I was applied to by Martha Croucher to relieve her husband, James Croucher, who she said was ill. I went to see him, and gave him temporary relief; he was

*816] at this time living in the parish of Elstead in the county of *Surrey. James Croucher stated that Crondall, in the county of Hants, was his parish. I reported the circumstance to the board of guardians of the Hambledon Union, the next board day. I was afterwards ordered by the board of guardians of the Hambledon Union to relieve the pauper James Croucher during his illness, and charge such relief to Crondall parish in the Hartley Wintney Union, Hants. I accordingly relieved the said James Croucher from time to time during his illness, and sent an account of such relief in a letter to Mr. Andrews of Odiham, one of the relieving officers of the Hartley Wintney Union, who sent me the amount thereof inclosed in the annexed letter. This was, I think, the first letter I received from him, and was in answer to my application for the repayment of the relief afforded to James Croucher and his family. I have received other letters since the above in the same handwriting, in answer to letters which I had addressed to him, 'Mr. Andrews, relieving officer, Odiham.' I kept no copy of the account or the letter I sent to Mr. Andrews; nor do I know the amount of the account.

"The examination of James Brooks, of," &c. "I am the clerk to the board of guardians of the Hartley Wintney Union in the county of Southampton. The parish of Crondall in the said county of Southampton forms part of this Union. I produce the abstract of the application and report book of the said Union, commencing the 25th March, 1838, and ending the 24th day of June, 1840. In p. 125 of this book is an entry of the allowance of the sum of 2*l.* 2*s.* 9*d.*, to be paid by Samuel Andrews, the relieving officer of the Hartley Wintney Union, for relief

(*a*) The letter, addressed to the relieving officer of the Hambledon Union, was annexed to his examination, and was as follows.

"Odiham, May 14th, 1840.

"Sir,—The inclosed I hope you will find correct for cash advanced to James Croucher and family, for which we feel much obliged for your trouble.

"From your humble servant,
S. ANDREWS, R. O."

to James Croucher, his wife and seven children, during illness. The entry *is signed with the initials of the Hon. Frederick Gough Calthorpe, the presiding guardian of the said Union. The application and report book of the said Samuel Andrews, one of the relieving officers for the said Union, now produced by him, wherein an order for payment of 2*l.* 2*s.* 9*d.* to James Croucher, his wife and seven children, was made the 27th March, 1840, is duly verified by my initials as clerk to the guardians of the said Union." [*817

The following were the grounds of appeal relating to the points reserved in the present case. That copies of the proceedings before the justices by whom the said order (of removal) was made were not sent, with a duplicate, &c., of the said order, to the overseers of Crondall; and that copies of all the examinations taken before the said justices touching the settlement of the said M. Croucher and her said children, and upon which the said order was made, have not been sent to us, particularly an examination of the said M. Croucher taken on 27th February last. And, as to the alleged relief, &c., in Elstead in 1839 and 1840, that the examinations do not contain any sufficient legal evidence of the relief of the said J. Croucher or his family by the churchwardens and overseers of the said parish of Crondall, or by any person or persons having any legal authority to acknowledge the said J. Croucher as a settled parishioner thereof; and that the evidence of the payment of 2*l.* 2*s.* 9*d.* by the board of guardians of the Hartley Wintney Union ought not to have been received; and that the said examinations do not contain any evidence of payment of that sum by the said parish of Crondall, or that the churchwardens and overseers of Crondall had any notice of the payment of that sum for the relief *of the said J. Croucher or otherwise, or knew that the said J. Croucher, his wife and children, were not then residing in the said parish of Crondall; nor do the said examinations contain any sufficient legal evidence of any acknowledgment of the said J. Croucher or his wife or children as settled parishioners of Crondall, by any person or persons having legal authority to bind the said parish. [*818

On the trial of the appeal, it was proved that the matter of complaint was heard, by the justices who made the order of removal, on two days, namely, on 27th February, when some of the witnesses were examined, and on 6th March, to which day the inquiry was adjourned, and on which day the remainder of the witnesses were examined. On 27th February, Martha Croucher, the pauper, was sworn, and made a statement in the presence of the said justices, which was taken down in writing. This writing was produced at the trial, and was in the following form:

"The examination of Martha Croucher, lately residing in the parish of Elstead in the county of Surrey, and now an inmate of the workhouse of the Hambledon Union in the said county, widow, touching the place of her settlement and the settlement of her eight children, taken upon oath

before us two of Her Majesty's Justices of the Peace acting in and for the said county of Surrey, the day of January, 1845. The said Martha Croucher on her oath saith," &c. (then followed the words of her examination, stating her marriage with her husband, their residence at Crookham, their being taken into the poor house at Crondall, where they remained six or seven days, and other particulars, as in her examination
*819] before stated.) This writing was *indorsed "1845. Draft examination of Martha Croucher, Feb. 1845: retaken afterwards." The words "draft," "Feb. 1845," "retaken afterwards," written in pencil. It was farther proved at the trial that, although the above document bears date in January, the statement was in fact made by Martha Croucher on the 27th February: that the said document was prepared by Mr. King, who was acting as the attorney for the parish of Elstead and was not otherwise acting as clerk to the said justices: that Martha Croucher signed it; and that no copy of it was sent to the appellants: and that the alterations therein and notes thereon were made by Mr. King after the 27th February. It was also proved that the examination of the said Martha Croucher on 27th February was not signed by the justices, and that she was re-examined on 6th March. Hereupon it was objected, for the appellants, that the said document was an examination, a copy of which ought to have been sent to the appellants with the other examinations. The respondents answered that it formed no part of "the examination upon which the order was made." The Court of Quarter Sessions overruled the objection, subject to the opinion of this Court, whether the said written statement of Martha Croucher of the 27th February, sworn to by her, but without a jurat, and not signed by the magistrate, was to be considered an examination of which a copy should have been sent to the appellants.

It was also objected, for the appellants, that these examinations contained no evidence of any acknowledgment by the parish officers of Crondall that J. Croucher and his family were settled in that parish, inasmuch as the only relief stated to have been given to them while
*820] residing out of the parish of Crondall was *the repayment of relief originally given by the relieving officer of the Hambledon Union, in which the paupers resided, by the guardians and relieving officers of the Hartley Wintney Union, and not by any officer of the parish of Crondall: and that, therefore, the respondent was not entitled to adduce evidence at the Sessions of any such acknowledgment. But the sessions overruled this objection, and confirmed the order, subject to the opinion of this Court, whether the relief stated in the examinations to have been given by the guardians through the relieving officer of the Hartley Wintney Union was sufficient to warrant the removing justices in considering it relief by the parish of Crondall.

If this Court should be of opinion that Martha Croucher's statement of February 27th was an examination of which a copy should have been

sent to the appellants; or that the relief stated to have been given by the guardians through the relieving officer of the Hartley Wintney Union was not sufficient to warrant the removing justices in considering it relief by the parish of Crondall; then the order of Sessions and the order of removal were to be quashed; otherwise the order of Sessions to be confirmed.

In Michaelmas term, 1846,(*a*)

Wallinger and *J. Pitt Taylor* were heard in support of the order of Sessions. First, it was not necessary, under stat. 4 & 5 W. 4, c. 76, s. 79, that a copy of the statement made in February should be sent; for that was not a regular examination, there being no jurat or sig-*nature of a magistrate. In *Regina* v. *Outwell*, 9 A. & E. 836, [*821 the examination which was not sent appears to have been in all respects regularly taken and completed. *Regina* v. *Bloxham*, 6 Q. B. 528, and *Regina* v. *Norbury*, 6 Q. B. 534, note (*a*), show that the document, if sent, would have been treated as a mere nullity. Perjury could not be assigned upon it. In *Regina* v. *Shipston upon Stour*, 6 Q. B. 119, an order was quashed because the settlement, upon which the order was founded, could not be made out without the aid of an examination which had an imperfect jurat. [COLERIDGE, J. The words of sect. 79 are "the examination upon which such order was made;" "examination" there is held(*b*) to be a nomen collectivum. Now, although the justices did not believe the facts deposed to in any examination, that would not make it unnecessary to send a copy of it.] Not where enough has been done to give it the character of an examination: but that is not so here. That evidence, not regularly received and drawn up with the formalities proper to an examination, forms no part of the examination upon which the order is made, appears from *Regina* v. *Holne*, 9 Q. B. 70. The evidence here was formally embodied in the examination taken in March, and thus received the character of an examination, a copy of which was properly sent: why should a copy of the previous draft be sent?

The Court then stated that they would consider whether it was necessary to hear the case further.

Lord DENMAN, C. J., in the subsequent Hilary vacation (February 10th), stated that it was quite clear that *all the examinations on [*822 which an order of removal proceeds must be sent to the parish on which the order is made; but that in this case, on minutely looking at the statement, the Court did not think the point arose, because it was doubtful whether this order had proceeded at all on the examination of the 27th February, inasmuch as it had not been taken down by the clerk to the justices, but by a person who was attorney for the respondent

(*a*) Saturday, November 14th. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and ERLE, Js.

(*b*) See *Regina* v. *Outwell*, 9 A. & E. 839.

parish, and acted in that character only; and that it would be necessary, therefore, to hear the other point argued.

The case was further argued, in Easter term, 1847,(a) by

Wallinger and *J. Pitt Taylor*, in support of the order of Sessions. As soon as it was established that the relief was given by order of the guardians of the Hartley Wintney Union in which Crondall is situate, this was a primâ facie case of acknowledgment by Crondall; and it then lay on that parish to show that under the circumstances it was no such acknowledgment. This is the view taken by the legislature in the enactment of stat. 9 & 10 Vict. c. 66, s. 7, "that the delivery of any pauper under any warrant of removal directed to the overseers of any parish at the workhouse of such parish, or of any union to which such parish belongs to any officer of such workhouse, shall be deemed the delivery of such pauper to the overseers of such parish." Delivery at the union house is a delivery to the officer of every parish in the union; *Slater* v. *Hodgson*, 9 Q. B. 727. *Regina* v. *St. Martin, New Sarum*, 9 Q. B. 241, shows that a parish is
*823] charged with the maintenance of a pauper who at a former time gained a settlement in what was then a distinct part of it. By analogy to this decision, now that the guardians of a union are the established representatives of the united parishes for purposes of relief (as appears from stat. 4 & 5 W. 4, c. 76, ss. 26, 38 and 54), every act done by them binds the parishes, respectively; though it certainly would not do so if it were an excess of their authority; as appears from *Regina* v. *The Justices of Surrey*, 5 Q. B. 506. For this reason overseers are compellable by mandamus to pay money ordered by guardians for purposes within the scope of their authority; *Regina* v. *Todmorden*, 1 Q. B. 185. The cases of *Regina* v. *Bradford*, 8 Q. B. 571, note ( ), and *Regina* v. *Little Marlow*, antè, p. 223, turn on a different point. It was held, there, that a statement of relief given by a relieving officer on the part of a parish was not sufficient evidence to charge the parish. But that was because there was no evidence of authority or assent by the parish. Here it is shown that the relief was given by the order of the guardians, and charged to the parish by their order; and the question is, not whether Crondall knew of it, but whether Crondall was bound by their act.

Knapp and *Corner*, contrà. The examination first taken ought to have been sent, for it constituted part of the case against the parish on which the order of removal was made; and the absence of jurat is immaterial; *Rex* v. *Emden*, 9 East, 437. [Lord DENMAN, C. J. We
*824] gave our opinion as to this point on a former occasion. No general question arose upon it; but, with reference to the particular circumstances of this case, we were of opinion that all the examinations had been sent.] As to the other point. If this evidence had

(a) April 28th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

simply been that the relieving officer of the union had administered relief to the pauper, on the part of the parish, that would clearly be insufficient to charge the parish; *Regina* v. *Little Marlow.* The question is, whether the case is carried farther by the relief being charged in the out-door relief list to the parish of Crondall. This in itself amounts to nothing. Unless the relief so charged is shown to have been given with the knowledge and by the authority of the parish, the entry in the book is no evidence to fix the parish; for, if its officers, as soon as the entry was brought to their knowledge, repudiated the paupers, still they would have no right to erase the entry. The requisite knowledge and authority of the parish are not shown; and essential facts must not be left to inference; *Regina* v. *Old Stratford*, 2 Q. B. 518, *Regina* v. *Wymondham*, 2 Q. B. 541, *Regina* v. *St. Margaret, Westminster*, 7 Q. B. 569. That the guardians are authorised to order relief on the part of parishes is true; it does not follow that they are authorised agents to bind parishes by admissions. Relief administered to an out-door pauper by the overseers of a parish is a strong admission, because it is taken that the overseers would not have given it unless they had well known that the pauper was settled in their parish. There is no reasonable presumption, when guardians order relief, that they have the same intimate knowledge or act on the *same motives. Guardians of a union have many statutory duties to perform independently of [*825 parochial control: and, on the other hand, they have no authority to interfere with the rating of the parishes within the union, nor to give notice of either chargeability or appeal on their behalf; *Regina* v. *St. Mary, Southampton*, 5 Q. B. 513, 518, *Regina* v. *Justices of Surrey*, 5 Q. B. 506. The guardians therefore are not such general agents that their admission can bind the parishes. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (June 10th), delivered the judgment of the Court.

In this case we take the remaining question to be, in effect, whether evidence was produced before the removing justices from which they could legimately infer that out parish relief had been given to the pauper by the authority of the appellant parish. Where an application for such relief has been made to the relieving officer of a union, whose duty it is to examine into the merits of the case, and to report thereon to the board of guardians, and when he has brought the application before that board, whose duty it is to inquire into the settlement, and to order such relief only in case of being satisfied that the settlement is in one of the parishes of the union, and relief has been ordered by that board on account of one of the parishes, and given by the relieving officer according to such order, all the steps now required by the law have been taken, and such relief is legally given. We also think that the justices are at liberty to infer the authority of the *parish for such relief from those steps, [*826 as the parish is represented at the board of guardians, and may

sequence solely of the insufficiency of the evidence given by the witnesses who appeared in support thereof;" "that he did not take any active part in opposing the finding of the said bills," "and that the only part he took was that, in his capacity of a grand juryman, he put such questions to the witnesses as he thought would best elicit the facts of the case." Mr. Hunt also made an affidavit, in which he denied his having unduly interfered, in the same terms as those used by Mr. Walters. The foreman of the grand jury deposed that Walters and Hunt "did not take any further or other part in the proceedings on the said bills than the part usually taken by grand jurymen in examining witnesses, and did not attempt, in any way, to bias or influence the others of the said grand jury;" "that all the witnesses whose names were indorsed on the said bills were called, and such of them as appeared were examined; and that the said grand jury, as this deponent verily
*830] believes, decided solely on the evidence so *adduced." One other grand juryman deposed to the same effect, not negativing the interference of Walters and Hunt more specifically. The undersheriff of the county deposed that, at the Quarter Sessions next after the assizes before mentioned, no grand jurymen were summoned from either of the two parishes.(*a*)

In Hilary term, 1847,(*b*)

Whateley and *G. K. Rickards* showed cause. The affidavits raise no case for a criminal information. It appears that all the witnesses have been heard. In 4 Bac. Abr. 406, ed. 7, tit. *Informations* (B), many instances certainly appear of criminal informations in cases where now no such informations would be granted: they are collected from 4 Hawk. P. C. 85, ed. 7, B. ii. ch. 26, s. 1. They include batteries, cheats, seductions of young men or women into improper marriages, and many other offences which would now be left to indictment. But, in 4 Bac. Abr. 231, tit. *Highways* (G), it is said that the Court of King's Bench "never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding the bill;" and *Rex* v. *Steyning*, Sayer's Rep. 92, is cited. The reason given, that "the fine set on conviction upon an information cannot be expended in the repair of the highway: whereas
*831] on an indictment it is always so expended," is perhaps not *quite satisfactory now, as, under stat. 5 & 6 W. 4, c. 50, s. 96, it seems that all fines are to be applied to the repair. In *Rex* v. *Green*, 1 Kenyon's Notes, 379, this Court appears to have laid down a rule like that suggested in Bacon, saying, "that if a bill had been preferred before the grand jury, at the assizes, and the nuisance proved, and the jury had,

(*a*) The affidavits in answer contained also depositions for the purpose of negativing the liability; but the counsel who opposed the rule did not, at this step, insist upon the merits of the question between the prosecutors and the parishes.

(*b*) January 28th. Before Lord DENMAN, C. J. PATTESON, COLERIDGE and WIGHTMAN, JJ.

notwithstanding, refused to find the bill, that might have been an inducement to the Court to grant this motion." The nuisance, of which proof is to be so required, appears to be something more than mere non-repair. It seems, indeed, that there is a precedent in the Crown Office, of a criminal information granted against the inhabitants of Berkshire for not repairing a bridge.(*a*) Stat. 4 & 5 W. & M. c. 18, which (sect. 2) put an end to the exhibiting of criminal informations without leave of the Court, except by the Attorney General, does not point out the occasions on which the Court ought to act: but, since that statute, informations have been granted more cautiously than before. In *Rex* v. *Welsborn & Walton*, 1 Sess. Ca. 168, S. C. W. Kel. (Cases in K. B.), 63, 5 G. 2, an information was moved for, for non-repair of a highway, where the grand jury would not find the bill; but it appears only that a rule nisi was granted: a precedent, in the case of the parish of Loughborough, is cited in the argument; but the circumstances do not appear. In *Rex* v. *Chedinfold*, Ca. K. B. Temp. Hardw. 159, 9 G. 2, a rule for an information for non-repair was made absolute "for the example sake," it appearing that there had been an attempt to rely upon a repair merely colourable. *Rex* v. *Steyning*, 27 G. 2, was later than any of these cases.

**Pashley*, contrà. The fact that two of the inhabitants were part of the grand jury raises a case within the principle admitted on the other side, and acted on by this Court some years since, when an information was granted against the Inhabitants of Berkshire for non-repair of a county bridge, the county Grand Jury having thrown out the bill.(*b*) In *Regina* v. *The Justices of Hertfordshire*, 6 Q. B. 753, an order of quarter sessions was brought up to be quashed, because two of the magistrates who had acted were interested in the result; and the Court there disallowed the principle (supposed to have been countenanced by some expressions from the Bench in *Regina* v. *The Cheltenham Commissioners*, 1 Q. B. 467) that the invalidity of the proceeding depends upon the fact that the votes of interested parties affected the result. [*832

Stat. 4 & 5 W. & M. c. 18, was not passed to narrow the class of cases in which informations should go, but to protect parties who were the subject of them, by requiring security for costs; sect. 2; and, in some cases, as appears from *Rex* v. *Proby*, 1 Kenyon's Notes, 250, by restraining an oppressive proceeding. The Loughborough case, cited in *Rex* v. *Welsborn & Walton*, is an authority, later than the statute, for granting the information. A criminal information was granted against commoners for a riot in pulling down fences, in 13 G. 2; *Rex* v. *Wyvil*.(*c*) And in the Directions for Justices of the Peace, &c., at the Old Bailey, given in Sir J. Kelyng's *Reports, p. 5, the Coroner and Secondaries are required to attend this Court, that informations may be put against [*833

(*a*) Post, p. 832, note (*a*).

(*b*) Mich. 3 G. 4. The case was mentioned, during the argument, by the Master of the Crown Office.

(*c*) Note (*a*) to *Mason* v. *Cæsar*, 2 Mod. 66.

townships for escapes. The cases mentioned in 4 Hawk. P. C., B. ii. c. 26, s. 1, have been referred to on the other side. In *Mr. Prynn's Case*, 5 Mod. 459, an information was exhibited, and held to lie, against seventy persons for a riot. In *Rex* v. *Joliffe*(*a*) a criminal information was granted against a private person for procuring the appointment of particular overseers with a view to his own advantage. In 1 Chitt. Cr. L. 849, ed. 2, the cases in which the information will be granted are enumerated: and they appear to extend to all offences below felony: and the limitations given, as to the discretion, in p. 853, are "either because the offence does not require so severe a proceeding" (which seems to have been the view of the Court in *Rex* v. *Proby*, 1 Kenyon's Notes, 250, though it is not easy to see why the proceeding is more severe than an indictment) "—because the party applying is himself culpable—or because the consequences of such a measure would be peculiarly oppressive." None of those limitations apply here; and the case is within the limits laid down in *Rex* v. *Steyning*, Sayer's Rep. 92; where, however, the Court was not unanimous in refusing the rule, and the majority seem to have thought the application frivolous: the affidavits here show the necessity of interposition. *Cur. adv. vult.*

Lord DENMAN, C. J., in the following vacation (8th February), delivered the judgment of the Court.

*834] This was an application of a peculiar kind. A road *indictment having been ignored by the grand jury, the prosecutor asked leave of this Court to file a criminal information against the inhabitants of the two parishes(*b*) in which the road lies.

The affidavits produced by him stated that two gentlemen possessing landed property in these parishes attended on the grand jury, and took an active part towards throwing out the bills; a witness who came before them says that he heard one of these gentlemen inform his brother grand jurymen that the road was useless. Before the assizes, the same gentleman had been applied to as a magistrate on the propriety of presenting the road, and had discountenanced a proposal to refer the question of liability to a barrister, saying that it was much fitter for the decision of a Judge. None of these facts are denied: but these two gentlemen swear, in the same very general terms, that they took no undue part in the proceeding; and the foreman and two other members of the grand jury state, in their affidavits, that the two gentlemen did nothing unusual on that occasion.

Now the bona fides of the proceeding against the parishes is undoubted; and there is a strong case as to the road being a highway, and the parishes liable. This case any one of the public has a right to bring before a jury for decision: but we are of opinion that the prosecutor has been improperly obstructed in the exercise of that right. We do not

(*a*) Cited in *Rex* v. *Waddington*, 1 East, 154.

(*b*) No distinct question arose as to the parish of Barnwood.

impute any improper motives to those who interfered in the manner described, nor express any opinion on the merits of the case: but we think that their connection with the parishes indicted ought to have prevented them from *taking any part in the discussion whether the bills should be found by the grand jury. The statement of the [*835 inutility of the road, though it might be irrelevant, was not unlikely to influence the grand jury in their decision. No imputation is cast upon that body at large: but the two or three members whose affidavits were produced prove no more than that they individually were not aware of any peculiar activity in the parties whose conduct is called in question.

The circumstances appear to us to be so irregular, and so inconsistent with the due administration of justice, that this Court is bound, in the exercise of its controlling power, to place the matter in a proper train for impartial investigation. The rule accordingly must be made absolute. See the case of *Rex* v. *Green*, 1 Kenyon's Notes, 379.

Rule absolute.

The information was accordingly filed; the defendant pleaded Not Guilty, and issue was joined. In this term,(*a*)

Pashley applied, on the part of the prosecution, for an order to examine, on oath, under stat. 1 W. 4, c. 22, s. 4, a witness resident in Gloucestershire, on affidavits showing that he was a material witness, and unable, from permanent sickness, to attend the trial. That act (sect. 1) extends the provisions of stat. 13 G. 3, c. 63, s. 40, to all "actions depending in any of His Majesty's Courts of Law at Westminster, in what place or country soever the cause of action may have arisen," "when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given *will be necessary or conducive to the due administration of [*836 justice in the matter wherein such writ shall be applied for." The question is, whether these words are large enough to embrace informations on behalf of the Crown. The word "action" has been extended in its meaning, for similar purposes, by various authorities. It has been held to include issues out of Chancery; *Bourdeaux* v. *Rowe*, 1 New Ca. 721: although in *King* v. *Simmonds*, 7 Q. B. 289, in Exch. Ch.,(*b*) it was held that error could not be brought on a judgment upon an issue under the Interpleader act, 1 & 2 W. 4, c. 58. [PATTESON, J. Supposing that the words of sect. 1 are large enough, when construed together with sect. 40 of stat. 13 G. 3, c. 63, to embrace informations, still that section appears to relate to examinations to be taken in colonies and other places in foreign parts only: the power to examine witnesses in England is given only by sect. 4; and that section speaks only of any "action" depending in the Courts therein named.] The words of sect. 1, "in what place or country soever the cause of action

(*a*) June 11th and 12th.

(*b*) Judgment affirmed in Dom. Proc.; *King* v. *Simmonds*, 1 H. L. Ca. 754.

may have arisen," are sufficient to extend its provisions to examinations in England, independently of sect. 4. [ERLE, J. It was decided in *Regina* v. *Wood*, 7 M. & W. 571, and *The Attorney General* v. *Bovet*, 5 M. & W. 60, that sect. 1 does not extend to informations at the suit of the Queen.] If those cases are to be held as deciding the point, they leave at all events the application under sect. 4 untouched. The only case as to the power under that section to direct the examination of a witness in England to be taken on an information is *The Attorney General*

*837] *v. *Reilly*, 13 M. & W. 676, where the Court of Exchequer made the rule absolute, but declined to decide the point, whether the examination would be receivable in evidence at the trial. [ERLE, J. That was under the peculiar practice of the Court of Exchequer in revenue cases.] If the question depends on the construction of the word "actions," it should be remembered that the present is substantially a civil proceeding, as much as a quo warranto; *Rex* v. *Francis*, 2 T. R. 484.(*a*) But the Court has also power to issue such commissions at common law, for its own information. In *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 174, Lord MANSFIELD cited a case with approbation, in which the Court enforced the consent of one party by means of a rule to stay proceedings unless such consent was given. In *Rex* v. *Morphew*, 2 M. & S. 602, a case of misdemeanour, the Court obliged the defendant to consent to an examination upon interrogatories, as a condition of postponing the trial. In *Macaulay* v. *Shackell*, 1 Bligh. N. S. 96, it appears to have been considered that a commission could issue (before stat. 1 W. 4, c. 22) to examine witnesses abroad in an action of libel. And in all these cases mere consent could not have given the jurisdiction, if the power had not otherwise existed.

Lord DENMAN, C. J. I do not think the power now claimed is incident to the jurisdiction of this Court at common law. It is true that instances of its exercise may be found: but they have not been regarded

*838] as authorities. Such an application can be granted only *under the statutes. But the statute 1 W. 4, c. 22, instead of the words "indictments or informations" used in stat. 13 G. 3, c. 63, s. 40, speaks of actions only. And there is reason for the omission; for, while the power thus given may be of great benefit in cases between private parties, it is easy to conceive much inconvenience arising from it in matters in which the Crown is concerned.

PATTESON, J. It is clear there was no such power at common law; otherwise the circuitous method pointed out in *Mostyn* v. *Fabrigas* would not have been necessary. The point as to sect. 4 was expressly decided by PARKE, J., in *Rex* v. *Lady Briscoe*, 1 Dowl. P. C. 520.

COLERIDGE, J., concurred.

ERLE, J. The reason why criminal proceedings were not included in the act may have been that, according to principle, an accused party

(*a*) See *Rex* v. *Sutton*, 5 B. & Ad. 52; *Regina* v. *Leigh*, 10 A. & E. 398, 406.

ought to have the opportunity of seeing and cross-examining the witnesses against him. Rule refused.(a)

The case was tried at the following summer assizes for Gloucestershire, before COLERIDGE, J.; when the defendants were found Guilty.

(a) Reported, from p. 835, by H. Merivale, Esq.

END OF TRINITY TERM.

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*Trinity Vacation.(a) [*839

The QUEEN *v.* The REGISTRAR of Joint Stock Companies. In the Matter of the SHEFFIELD and ROTHERHAM and CHESTERFIELD Fire and Life Insurance Company.

A joint stock company completely registered under stat. 7 & 8 Vict. c. 110, and thereby "incorporated" by virtue of sect. 25, has no power after such incorporation to change its name. And the registrar of joint stock companies, having refused to receive a return of such change of name, produced under sect. 10, was held, on motion for a mandamus, to have done rightly.

A RULE nisi had been obtained for a mandamus to the registrar of joint stock companies to receive and register the return of the change of name of a joint stock company, within the meaning of stat. 7 & 8 Vict. c. 110, from the name of "The Sheffield, Rotherham and Chesterfield Fire and Life Insurance Company" into the name of the "North of England Fire and Life Insurance Company."

It appeared from the affidavits that the Company was completely registered on 13th December, 1845, under stat. 7 & 8 Vict. c. 110, and received a certificate of such complete registration, as provided by the act, under the first of the above names, pursuing the deed of partnership, which bore date the 26th November, 1845. The name was set forth accordingly in the schedule to the deed containing the several particulars required by sect. 7 of the act. The deed provided that two-thirds of the votes of the shareholders present, and not declining to vote, at two extraordinary meetings specially called, or at any ballot which should have been duly demanded at such meetings or either of them, should be requisite to *make new laws, regulations, provisions and by-laws for the said Company, or amend, alter or repeal all [*840 or any of the laws, regulations, provisions and by-laws of the Company for the time being, or to direct any supplementary or additional deed of settlement, *or to change the name or style for the time being of the* Com-

(a) The Court sat in Banc on the 14th and 15th, 21st to 23d, 25th and 30th, of June, and 1st, 2d, 3d, and 7th of July, in this vacation.

pany, or to consent to any extension or alteration of the general object or business of the Company as in the said deed defined, &c. The shareholders having subsequently resolved, pursuant to a special power in the deed, to raise the capital from 200,000*l.* to 500,000*l.*, a special meeting of the directors was held on 23d September, 1846, at which it was resolved, subject to the approval of the shareholders, that the Company should bear the name of The North of England Fire and Life Insurance Company. This resolution was duly confirmed, at two extraordinary meetings of the shareholders, by the requisite majority. A return of the change of name was accordingly transmitted to the registrar of joint stock companies, who declined to receive it, on the ground that the Company was already completely registered under sect. 25, and declared to be incorporated by the name mentioned in the deed of settlement. A draft of a supplementary deed for the purpose of carrying out this resolution was afterwards prepared and tendered to the registrar, who declined to receive it. In the last term,(*a*)

Sir *J. Jervis*, Attorney General, and *Waddington*, showed cause. This is a question of some difficulty. The Company contend that, *841] although a corporation is *bound either to accept or repudiate a grant in full, yet it may obtain a new charter with a new name. That is conceded. But the point here arises simply on the terms of stat. 7 & 8 Vict. c. 110. By sect. 10 it is provided that "within six months after any change shall have taken place in any of the particulars hereinbefore required to be set forth in the schedule to the deed of settlement" (set forth, that is, for the purpose of complete registration), "except so far as respects the shareholders thereof and their respective shares, there shall be transmitted returns of such particulars, so far as the same shall have been changed: and if within such period any such return be not made, then, on conviction thereof, every director of such company shall be liable to pay a sum not exceeding 20*l.*" These particulars are specified in sect. 7; and the first is, the name of the company. And, by sect. 14, it is provided that "annually in the month of January in every year every company completely registered under this act, except companies which shall have been incorporated by act of parliament after complete registration, shall make to the said registry office a return of the *name* and business of the company; and that on the receipt of such return the registrar of joint stock companies shall give a certificate thereof." Then sect. 15 requires the registrar to register all returns made conformably to the act, and to grant a certificate of such registration. Then, by sect. 25 it is enacted that "on the complete registration of any company being certified by the registrar of joint stock companies such company and the then shareholders therein," &c., "shall be and are hereby incorporated as from the date of such certificate by the name of the company as set forth in the deed of settlement,

(*a*) June 10th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

and for the purpose of carrying on *the trade or business for which the company was formed, but only according to the provisions of this act, and of such deed as aforesaid, and for the purpose of suing and being sued," &c., "and such company shall continue so incorporated until it shall be dissolved, and all its affairs wound up." Here the complete registration thus provided for has taken place; and, consequently, the company is incorporated by its name as set forth in the deed of settlement, and cannot change it. Sect. 25, therefore, shows that the provision in sect. 10, which appears to allow of a change of name as well as other particulars being returned to the registrar, cannot be considered to extend to companies completely registered. But, if this were otherwise, sect. 10 is only directory, and addressed to the company, not to the registrar, whose duties are prescribed by the other sections cited. The difficulties of a contrary construction would be that, in the first place, the company would in this manner virtually acquire the prerogative of the Crown to grant a new charter. This was provided against in stat. 7 W. 4 & 1 Vict. c. 73, an act on a precisely similar subject, which, by sect. 7, enacts that, during the continuance of any company registered under that act, "no change shall be made in the name or style thereof." Again, by sect. 66 of stat. 7 & 8 Vict. c. 110, power is given to enforce judgments against any shareholder for the time being, or any such former shareholder, as is there mentioned, of any company completely registered under the act. But, if the company were to change its name between the commencement of the action and judgment, it is difficult to see how such a judgment could be enforced against a former shareholder of the same company under a different name. [*842

*Sir *F. Thesiger* and *F. Robinson*, contrà. As to the last difficulty, it is clear that the Company could not take advantage of any such misnomer; *The Mayor, &c., of Carlisle* v. *Blamire*, 8 East, 492: neither, it is apprehended, could the individual shareholders. Independently of statute, there is nothing to prevent a joint stock company from changing its name. The question therefore is, whether a power which confessedly resided in such companies before the act is taken away from them. In the present instance, the Company had reserved to itself this power under the deed of settlement, to be exercised with the consent of two-thirds of the shareholders. They now seek to have a change of name, thus regularly made, registered: and the answer is, that they are incorporated by the former name. But sect. 10 seems intended to meet this very difficulty: and its effect would merely be, if the interpretation contended for on the part of the Company is correct, that the Company would be incorporated subject to the provisions of its act of settlement, change of name among the number. A corporation may be incorporated by one name with liberty to sue by another; *The College of Physicians* v. *Butler*, 1 (W.) Jones, 261. The [*843

provision of stat. 7 W. 4 & 1 Vict. c. 73, s. 7, seems rather to show that at that time it was thought necessary to restrict by positive enactment the power which companies registered under that act would otherwise have possessed of changing their names. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (July 7th), delivered the judgment of the Court.

*844] In this case a mandamus had been moved for to the *registrar of joint stock companies to register a supplementary deed for changing the name of a company completely registered under stat. 7 & 8 Vict. c. 110, which had provided for a possible change in the original deed. In support of the rule it was contended that there was no express prohibition in the statute, and that the legislature intentionally omitted the prohibition in stat. 7 W. 4 & 1 Vict. c. 73, s. 7: that partnerships were at liberty to change their style, and that joint stock companies were in the nature of trading partnerships: and that sect. 10 relates to a change of name, as it requires, within six months after any change in any of the particulars required to be set forth in the schedule to the deed of settlement (the name being one of such particulars), a return of the particulars so changed. But it appears to us that, after a company has been completely registered without defect or omission, so as to *be incorporated* by the name set forth in the deed of settlement, such incorporated company has not the power to change its name.

The identity of name is the principal means for effecting that perpetuity of succession with members frequently changing, which is an important purpose of incorporation; 2 Bac. Abr. 255, tit. *Corporations* (C) 1, (7th ed.) And, though the King by his prerogative might incorporate by a new name, and the newly-named corporation might retain former rights, and sometimes its former name also; *Regina* v. *Bailiffs of Ipswich*, 2 Ld. Ray. 1239; *Mellor* v. *Spateman*, 1 Saund. 339, 344;(a) and *Mellor* v. *Walker*, 2 Saun. 1, 2; it never appears to be such an act as the corporation could do for itself, but required the same

*845] power as created a corporation. The statute 7 *& 8 Vict. c. 110, does not express any intention of changing this general principle; but, by section 25, incorporates the company by the name set forth in the deed, and declares that it shall continue *so* incorporated until it shall be dissolved. The same section expressly authorises a change of seal from time to time, but does not mention any change of name.

It is obvious that the title to shares, and the liability on contracts, and the right to assets, would be likely to be brought into confusion if the name was subject to change: and, though there may be no danger of such confusion in this case, yet our decision must be on the general principle.

(a) See note (2) p. 240; 6th ed.

The legislature declared its sense of the importance of keeping the same name for a body consisting of changing members, as the change of name for joint stock companies unincorporated was forbidden by stat. 7 W. 4 & 1 Vict. c. 73, s. 7; and the re-enactment of the same clause in stat. 7 & 8 Vict. c. 110, was probably considered unnecessary, as the companies were by the latter act incorporated. The provision in the 10th section for registering a change in any of the particulars required for the deed of settlement may have full effect without applying to a change of name, as ten requisites were specified, including the name; and, though the provision implies that some of the requisites are liable to change, it does not follow that all should be so liable. This provision would also remedy any defect or omission in respect of the name, in case either should have happened, when complete registration was intended. There is no analogy between a trading partnership and a joint stock company incorporated, in respect of change of members or of the rights and liabilities of new members; and *therefore there is not the same necessity for a continued name for a partnership as there is for an incorporated company. [*846

For these reasons, it appears to us that the company have failed to establish a right to the change of name which they claimed to have registered; and that therefore the rule must be discharged.

Rule discharged.(a)

(a) Reported by H. Merivale, Esq.

MILLEN *v.* DENT.

A bill of parcels, delivered by plaintiff, having at the foot of it a receipt, written at the same time with the bill, is nevertheless admissible without a receipt stamp, for the purpose of proving that the goods mentioned were sold to a third person and not to the defendant.

DEBT for goods sold and delivered. Plea (among others): Nunquam indebitatus. Issue thereon.

On the trial, before ALDERSON, B., at the Yorkshire Spring assizes in this year, the defence was that the goods were sold, not to the defendant, but to his nephew, John Dent.

In support of his case, the defendant offered in evidence a bill delivered by the plaintiff, in which the nephew was the person charged. At the foot of this bill was written, "Settled to William Millen, Oct. 27th, 1845. Witness, John Robinson." The witness Robinson stated that the bill, and the words at the foot of it, were written on the same occasion. The paper had no receipt stamp, and was objected to as therefore inadmissible in evidence. ALDERSON, B., overruled the objection: and the defendant had a verdict on the above issue. *Bliss*, in last Easter term, obtained a rule nisi for a new trial, on the

*847] ground *that the paper required a receipt stamp. In the same term,(a)

Watson showed cause. The instrument, although unstamped, was admissible in evidence, for the purpose for which it was offered. It was not offered to prove payment; nor was the word "settled" put in evidence: but that part of the instrument which constituted the bill of parcels was offered for the purpose of showing to whom the plaintiff had sold the goods. The bill of parcels was in effect a separate instrument from the receipt at the end of it. Even if the instrument be treated as one and entire, its admissibility depended upon the purpose for which it was produced. Thus in *Regina* v. *Gompertz*, 9 Q. B., December 17th, 1846, S. C. 16 Law J. (N. S.) Q. B. 121, an unstamped warrant of attorney, and in *Keable* v. *Payne*, 8 A. & E. 555, an unstamped check were admitted in evidence to prove fraud; and in *Reed* v. *Deere*, 7 B. & C. 261, an unstamped agreement was admitted for the collateral purpose of showing that a prior agreement had been varied by it.

Bliss, contrà. The bill of parcels never had any separate existence from the receipt; the bill and receipt were made out and delivered at the same time, as one instrument. The word "settled" was nothing by itself, and could not be given in evidence without the bill. [Lord DENMAN, C. J. The converse does not follow; for the bill was something

*848] by itself, and complete as a bill, *without the word "settled."] *Smith* v. *Kelby*, 4 Esp. N. P. C. 249, seems to be decisive of the present question. That was an action for goods sold and delivered: the defence was, that, when the goods were sold, the plaintiff agreed to take the defendant's promissory notes in payment, and that the action was commenced before the time expired for which the defendant was to have credit under the notes. In support of his case the defendant produced the plaintiff's bill of parcels, at the bottom of which was written, "settled by two bills,—one at three months, and one at nine months." The paper was rejected for want of a stamp. [WIGHTMAN, J. There the instrument was used as a receipt. The case is badly reported; Lord ELLENBOROUGH is represented as saying that the agreement as to a particular mode of payment rendered a stamp necessary. But the stamp in question must have been a receipt stamp; for an agreement as to the sale of goods requires no stamp. Lord DENMAN, C. J. In *Brookes* v. *Davies*, 2 C. & P. 186, it was held that a receipt, if it is not given in evidence *as a receipt*, does not require a stamp. In that case the receipt was headed by a bill of parcels on the same paper; and the object appears to have been to make evidence of the bill only.] All the cases, in which an instrument of this kind not duly stamped has been read for some collateral purpose, are nisi prius cases, except *Watkins* v. *Hewlett*, 1 B. & B. 1; and all are previous to *Jardine* v. *Payne*, 1 B. & Ad. 663, which expressly overruled *Bishop* v. *Chambre*, Dan

(a) May 6th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

son & Lloyd, 83. In *Bishop* v. *Chambre* it had been decided *that an unstamped promissory note might be referred to, to ascertain the amount of a debt, where there had been a parol promise to pay. But in *Jardine* v. *Payne*, 1 B. & Ad. 663, 670,(a) it was held "that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues," and that, where the defendant, who was sued as acceptor of a bill of exchange by the indorsee, had left at his own residence a letter addressed generally "to the gentleman who calls with the bill," stating the amount, and name of the drawer, and admitting his own liability, the bill, which was improperly stamped, could not be produced to show that the plaintiff was the unknown indorsee and holder to whom the admission had been made. In *Grey* v. *Smith*, 1 Campb. 387, where a receipt and an agreement were written on the same paper, it was held that the paper was receivable in evidence as a receipt, if stamped as such, though it had not an agreement stamp also. But Lord ELLENBOROUGH, C. J., in that case ruled that, "If what followed had at all controlled or qualified what went before, he should have rejected the paper in toto, without an agreement stamp." Now in the present case the word "settled" does control the bill; for a receipt negatives the assertion of a debt. [Lord DENMAN, C. J., mentioned *Jacob* v. *Lindsay*, 1 East, 460.] *Green* v. *Davies*, 4 B. & C. 235, shows that, if an entire document has not such stamps as make it evidence in its entirety, a single part cannot be picked out and given in evidence because pro tanto the stamp may be sufficient. *Accordingly a receipt was there held inadmissible as evidence of an account stated, because the same instrument was also a promissory note, and not stamped as such. [*849] [*850]

Cur. adv. vult.

Lord DENMAN, C. J., in this vacation (July 7th), delivered the judgment of the Court.

This was an action for goods sold and delivered: and the question in the cause was to whom the goods were sold, if to any one. The defendant called one John Dent, his nephew, who swore that the plaintiff sold the goods to him, though he had never paid for them, and that he had resold them to the defendant at a loss of 3*l*. To corroborate his testimony, the defendant proposed to put in a paper, which was a bill of parcels from the plaintiff to John Dent; and, if it had been nothing more, no question as to its admissibility could have arisen: but at the foot of it was added "settled to W. Millen, Oct. 27th, 1845. Witness John Robinson." The plaintiff's counsel contended that this addition made it a receipt, and that, as it had no stamp, it could not be received in evidence. The defendant did not seek to read that part; for it was not his object to prove payment, but that he had not purchased from the plaintiff at all. No doubt, where two separate instruments, each com-

(a) See *Haigh* v. *Brooks*, 10 A. & E. 309, 321.

plete by itself, are written on the same paper, one may be received in evidence without the other. If an agreement and receipt are so written, we see no reason for excluding the agreement on account of a defect in the want of stamp to the receipt. The converse was expressly held in *Grey* v. *Smith*; and *Brookes* v. *Davies*, 2 C. & P. 186, is an authority to the same effect.

*851] *But it was said that the witness to the receipt, John Robinson, whose evidence was probably unnecessary to prove the bill of parcels, being examined, swore that the whole contents of the paper were written by him at the same time by the authority of the plaintiff and in his presence, and therefore that the paper never had a separate existence as a bill of parcels. We do not think that this circumstance alters the case. The paper contained essentially two instruments distinct in their nature and operation; and their being written at the same time cannot do away with that distinction.

Upon the whole, we are of opinion that the evidence was rightly received, and that this rule must be discharged. Rule discharged.(a)

(a) Reported by H. Davison, Esq.

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*852] *The QUEEN *v.* The Churchwardens and Overseers of ST. GEORGE THE MARTYR, SOUTHWARK.

Case of BETHLEM HOSPITAL.

Case of BRIDEWELL HOSPITAL.

1. Bethlem hospital is erected on lands in the parish of St. George, Southwark, demised to trustees for the mayor and corporation of London, under stat. 50 G. 3, c. excviii., which directs the building thereon of a new lunatic hospital in lieu of the old one, situate in the city of London, of which the Corporation were governors under letters patent of 38 Hen. 8. In this hospital indigent lunatics are received for cure, and, if not capable of cure, are received into the incurable class. Payments are made for some of the incurable by friends of the patients, or by the officers of the parishes from which they are sent: but the payments are in no instance sufficient to afford a profit. Part of the hospital is used for the custody, care, &c., of criminal lunatics, for whom Government make a payment, as nearly as possible equal to the expense of their maintenance, &c., but without charge for lodging. The whole funds are applied for the purposes of the charity.

Held, that the corporation of London were not rateable for these premises, although, by stat. 50 G. 3, c. xlv. s. 1, persons occupying, &c., "any land, ground, house, building, tenement, hereditament, or premises in the parish," were rateable to the relief of the poor: it being enacted by sect. 28 of the same act (after noticing by recital the existence of many charitable institutions in the parish which contributed nothing to its exigencies) that no settlement should be gained in the parish by any occupation, residence, &c., in any hospital, or other charitable institution, then or thereafter situated or established in the parish.

2. The "House of occupations" in the same parish is part of Bridewell Hospital, in the city of London, and stands on lands demised to trustees for the Corporation of London, as governors of Bridewell, which is an hospital for the reception of destitute persons and vagabonds, and for their correction and employment. The House of occupations is used for the reception of such persons, from any place whatever, found within London, Middlesex, or part of Surrey. They are employed in working up goods, for which the materials are found by the governors, and which are partly consumed on the premises and partly sold; and the money received from the sale of such part as is sold is brought into the general funds of Bridewell

Hospital, which are applied solely for the purposes of the charity, the governors deriving no profit from the sale.

Held, that the Corporation were not rateable for the "House of occupations."

ON appeal by the Mayor and commonalty and citizens of the city of London, as Masters, guardians and governors of the house and hospital called Bethlem (after described), against a rate for the relief of the poor of the said parish, dated 1st January, 1845, at the rate of 11*d.* in the pound, to which rate they were assessed *as occupiers of the [*853 said Hospital, the sessions allowed the appeal, subject to the opinion of this Court upon the following case: and on appeal by the same parties, as Governors of the hospital of Bridewell, against the same rate, by which they were assessed in respect of the House of occupations after described, the sessions also allowed the appeal, subject to the case after stated in respect of that rating.

By stat. 50 G. 3, c. xlv. (local and personal, public), entitled, "An act for better assessing and collecting the poor and other rates in the parish of St. George the Martyr, in the borough of Southwark, in the county of Surrey, and regulating the poor thereof," the churchwardens and overseers of the poor of the said parish were empowered to rate all persons who should "inhabit, hold, use, occupy, possess, or enjoy any land, ground, house, shop, warehouse, storehouse, cellar, coachhouse, stable, vault, building, tenement, hereditaments, or premises, or the landlords, owners, lessee or lessees thereof respectively," for and in respect of such land, ground," &c., "at and by a fair equal pound rate upon or according to the annual rent or value thereof respectively, and not otherwise, except as hereinafter is enacted."

Case of BETHLEM HOSPITAL.

Bethlem Hospital was instituted for the reception, maintenance and care of lunatics, and is still so employed. By letters patent, dated 13th January, 38 H. 8, the custody, order and government of Bethlem Hospital, then situate in the city of London, and its appurtenances, were given and granted to the Mayor and commonalty and citizens of London, and their successors; and the *said Mayor, commonalty, [*854 and citizens, and their successors, were thereby constituted Masters, keepers and governors of the said Hospital and its appurtenances. By letters patent of Edward VI., dated the 23d April, 1550, the said Mayor, commonalty and citizens were seised in fee of certain lands in St. George's Fields in the said parish of St. George the Martyr. By an act of parliament, 50 G. 3, c. cxviii., local and personal, the Mayor, commonalty and citizens aforesaid were empowered and directed to demise the said last mentioned lands in St. George's Fields to trustees for the governors of the said Hospital of Bethlem, upon condition, and the said act of parliament authorised and directed, that the said governors should erect thereon a new hospital for the reception of not less

than 200 lunatics in lieu and instead of the hospital then situate near Bishopsgate. By indenture, dated 11th July, 1810, the said lands in St. George's Fields were demised in pursuance of the said act of parliament to trustees for the said Mayor, commonalty and citizens of London. And the Hospital of Bethlem, now known and rated as Bethlem Hospital, was erected upon part of the said lands.

As many patients (who are indigent and lunatic) are admitted into the hospital as there is room for; and it is kept as full as possible: but none are received who are possessed of any estate or money sufficient to maintain them elsewhere. The regulations in the standing rules and regulations and orders of Bethlem Hospital are adhered to. (A copy of the rules and orders accompanied the case.) Indigent lunatics are received in the hospital for cure, and are provided with maintenance and medicine, and every other necessary except clothing, for twelve or fifteen months, and frequently longer when *there is a prospect of cure, without any charge or payment whatever. If they are not cured in twelve or fifteen months, and in some instances a longer period, they are discharged. When discharged from the curable class, they are declared to be fit or unfit, as the case may be, for the incurable class, and are admitted thereto forthwith, or as vacancies occur, without favour or affection, in turn. No patients are admitted in the incurable class but those who have been already in the hospital for the purpose of cure for the space of one year at least, and are at the end of it found to be incurably mad, dangerous and ungovernable. For many of the incurable patients their friends and relatives, and, when received from parishes, then the parish officers, pay towards maintenance and medicine, averaging about 6*s.* per week; but the payments are in no instance sufficient to afford any profit: and charges are made for maintenance only, or for clothes; and no other charge is made for residing in the hospital or for medical attendance. Where it has been found necessary or expedient to furnish clothing to any of those patients in consequence of the relatives or friends neglecting to do so, such articles as are necessary are provided from the hospital stores, and the actual prime cost is repaid by the friends of the lunatic. At the time of making the assessment appealed against, there was one patient in the hospital from the respondent parish; and there has seldom been a time when the hospital was without patients from that parish.

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The amount received by the appellants during the year 1844 towards providing the maintenance and medicine for the incurable patients generally was 1100*l.* or 1200*l.*; and the money so received was paid into the *funds of the hospital, and applied entirely towards the payment of provisions, medicine and other necessaries for the patients.

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A part of the hospital rated is used for the reception, care and custody of criminal lunatics, and for no other purpose; and that part of the

hospital was erected by and at the cost of Government. All repairs, alterations and additions are paid for by Government. Criminal lunatics are admitted and discharged by warrant of the Sovereign or secretary of state, and by no other authority whatever. The governors are ordered by the warrant to receive and take charge of the criminal patients; and they have no discretion in the matter. The same physician, apothecary, steward and matron, that attend to the other parts of Bethlem Hospital, attend also to this department. They are appointed by and under the superintendence and control of the appellants. Government pay those parties for such services. The keepers of the criminal lunatics are appointed by the appellants; and their maintenance and wages are paid by the Government in the general expenses of this department. The sum paid annually by the Government for the maintenance and medicine supplied to the criminal lunatics is as near what it costs the hospital as possible; they are not charged rent of premises, or anything of the kind. Sums received towards providing the maintenance and medicine for the incurable patients, and also the money received from the Government for the reimbursement of the costs of maintenance and medicine provided by the hospital for the criminals, are paid into the general funds of the hospital, and appropriated and applied to and for the general objects of the charity. The *whole of the [*857 funds of the hospital are applied for the purposes of the charity, and for none other whatever; and none of the governors do or have received, or receive, derive or have derived, nor by the regulations and laws of the said hospital, or by the constitution thereof, could or can they receive or derive, any compensation, emolument, profit, advantage or benefit whatsoever.

Stat. 50 G. 3, c. xlv. s. 28, enacts as follows: "Whereas there are a great number of charitable institutions and societies within the said parish, in which many children are kept as apprentices or otherwise, and wherein many other persons are employed, and which institutions and societies do not contribute anything to the exigencies of the said parish; therefore be it further enacted, that no person shall gain or be deemed or adjudged to gain or acquire a settlement in the said parish of Saint George the Martyr, by reason or means of any occupation, residence, hiring, service, or apprenticeship in or to any of the public schools, hospitals, asylums, reforms, or other charitable institutions or societies, now or which shall hereafter be situated, established, or be within the said parish, or to any person or persons residing or dwelling within the said parish, with or to whom he, she, or they may be bound, placed, or put out by the governors, manager, directors, or servants of any or either of such schools, hospitals, asylums, reforms, or other charitable institutions or societies."

On the hearing of the appeal, it was contended on the part of the appellants so rated as aforesaid, that Bethlem Hospital was not rateable,

upon (amongst others) the following grounds: That it was a charitable institution, used and occupied entirely for charitable *purposes, *858] and not beneficially, or as a source of profit or emolument. That it was a public institution, used and occupied entirely for public purposes, and not beneficially, or as a source of profit or emolument. That it was a royal foundation, or part and parcel of a royal foundation, used and occupied for public purposes only, and that the appellants were mere trustees without beneficial interest. It was also contended that Bethlem Hospital was exempted from the rate by stat. 50 Geo. 3, c. xlv. s. 28, above alluded to.

The question stated for the opinion of the Court was: Whether Bethlem Hospital, under all the circumstances, is or is not exempt from liability to the rate. If the Court should be of opinion that Bethlem Hospital was so exempt, so much of the assessment as related thereto was to be struck out, and the order of Sessions confirmed. If the Court should be of a contrary opinion, then the order of Sessions was to be quashed, and the original rate confirmed.

The case set out the letters patent of Edw. 6 (25th April, 1550), by which the lands in question were granted to the Mayor, commonalty and citizens of London, as tenements of the King, formerly part of the possessions and hereditaments of Charles Duke of Suffolk: the lease of 11th July, 1810, reciting the act 50 G. 3, and the letters patent, by which the Mayor, commonalty and citizens demised them to Sir Richard Carr Glynn and Richard Clarke, their executors, administrators and assigns, for a term of 865 years, in trust for the governors for the time being of Bethlem Hospital, for the purposes of the said act of parliament, with a covenant that the governors should build on some part of the said lands *a new hospital, convenient and adapted for the *859] reception of not less than 200 patients: and the rules of the hospital already mentioned.

Case of BRIDEWELL HOSPITAL.

The "house of occupations," in respect of which the appellants were rated, is an appendage to, or a part of, the hospital of Bridewell, as hereinafter mentioned, of which hospital the appellants are the governors. The hospital of Bridewell is situate in the city of London, and the house of occupations in St. George's Fields, in the respondent parish, and contiguous to Bethlem Hospital, and in the borough of Southwark.

Bridewell Hospital was instituted for the purpose of harbouring, correcting, reclaiming and employing destitute persons and vagabonds, as by the charter of Edw. 6, and deed of settlement (annexed to the case) appears; and is still so used. By the said letters patent of Edw. 6, dated 26th of June, 1552, Bridewell Hospital was granted to the Mayor, commonalty and citizens of London, and their successors, and they were

thereby empowered to send and commit such destitute persons and vagabonds to the house of occupations, in Bridewell, and to make rules for the good government of such persons therein, who should be forced to practise and exercise themselves in honest and profitable sciences and occupations: and the Mayor, commonalty and citizens of London, and their successors, were empowered and directed to make all manner of decrees, convenient and honest ordinances, statutes and rules for the good *government of the poor in Bridewell. By the said deed of settlement of June 12, 1552, made between Edward 6, and the [*860 Mayor, commonalty and citizens, the said Mayor, commonalty and citizens were to set up and erect a house of occupations as therein mentioned. By lease, dated 1st August, 1828, a portion of the land contiguous to Bethlem Hospital was demised to trustees for the Mayor, commonalty and citizens of London, as governors of Bridewell; and the house of occupations was erected thereon. The house of occupations is used for the reception of destitute persons, youths and vagabonds of both sexes, from any place whatever, found within the city of London, the county of Middlesex, or a portion of the county of Surrey, for the purposes specified in the charter: and such persons are all maintained entirely at the charge of Bridewell Hospital. These destitute persons are employed by the governors of Bridewell Hospital, as directed by the charter, in "learning and exercising honest sciences and occupations," such as shoe-making, tailoring, baking, brewing, and rope-making, washing, household and needlework.

The raw materials necessary for the purpose are purchased by the governors. No more goods are manufactured than are necessary for the teaching practically the sciences, occupations and trades in which the inmates are instructed. Some of the articles so manufactured are sold to the public: but the only articles sold are those which are not required for consumption in the hospital of Bridewell or Bethlem, such as the surplus of the twine and mats not used. The money, about 200*l.* a year, received from the sale to the public of the articles which are not consumed in the hospital is brought into the general funds of *Bridewell Hospital, and forms part of the fund for the purchase [*861 of other materials to be also manufactured by and in teaching the inmates: and the governors do not derive any profit or advantage whatever from the sale of any articles manufactured as aforesaid.

The whole of the funds of the hospital are applied solely for the purpose of the charity, and for none other; and none of the governors do or have receive or received, derive or derived, nor by the regulations and laws of the said last mentioned hospital, or by the constitution thereof, could or can they receive or derive, any compensation, emolument, profit, advantage or benefit whatsoever, having no interest whatever, being governors appointed under the authority of the charter.

The arguments set out in the case on the part of the appellants, and

the question for the decision of the Court, were the same as in the case of Bethlem Hospital.

The case of Bethlem Hospital was argued in Easter term,(*a*) 1847, by *Watson* and *Wallinger* in support of the order of sessions, and *M. Chambers*, *Peacock* and *Knapp*, contrà.

The following cases were cited in the course of the argument. *Rex* v. *St. Bartholomew*, 4 Burr. 2435; *Rex* v. *St. Luke's Hospital*, 2 Burr. 1053; *Rex* v. *Waldo*, Cald. 358; *Rex* v. *St. Giles, York*, 3 B. & Ad. 573; *Regina* v. *Sterry*, 12 A. & E. 84; *Regina* v. *Badcock*, 6 Q. B. 787; *Attorney *General* v. *Christ's Hospital*, 1 Russ. & M. 626; *Neave* v. *Weather*, 3 Q. B. 984; *Rex* v. *Liverpool*, 7 B. & C. 61; *Rex* v. *The Trustees of the River Weaver Navigation*, 7 B. & C. 70, note (*c*); *Regina* v. *The Mayor, &c. of Liverpool*, 9 A. & E. 435; *Regina* v. *Shepherd*, 1 Q. B. 170; *Regina* v. *The Justices of Worcestershire*, 11 A. & E. 57; *Regina* v. *Exminster*, 12 A. & E. 2; *Regina* v. *Shee*, 4 Q. B. 2; *Rex* v. *S. Field*, 5 T. R. 587. *Cur. adv. vult.*

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The case of Bridewell Hospital was argued in Easter and Trinity terms, 1847,(*a*) by the same counsel.

Some of the above authorities were again cited; also *Governors of the Bristol Poor* v. *Wait*, 5 A. & E. 1, and *Regina* v. *Wallingford Union*, 10 A. & E. 259. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (July 7th), delivered the judgment of the Court.

In this case the corporation of London, as masters, guardians and governors of the house and hospital called Bethlem, appealed against a poor rate made upon them as occupiers "of certain buildings and ground called Bethlem Hospital, situate in the parish of St. George, Southwark."

The appellants contended that they were not beneficial owners or occupiers of the property in question; that they were only interested as trustees of a public *and charitable institution, and therefore that they were not rateable. The respondents (the parish officers of St. George) in the first place relied upon the comprehensive words of stat. 50 G. 3, c. xlv., s. 1. (His Lordship here read the material words; see p. 853, antè.)

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Under the terms of that section the premises in question would be included, though used for charitable purposes only; and, if that section had been the only one in the act of parliament, it would have been difficult to contend that they were not rateable. But it appears clearly from the 28th section of the act that it was not intended that the 1st section should apply to charitable institutions which would not be rateable independently of that act. The 28th section expressly recognises

(*a*) May 1st. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

(*b*) May 1st and May 27th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

the existence of charitable institutions in the parish which contribute nothing to the public burthens, and provides that no settlement shall be gained in the parish by any occupation or residence, or hiring and service, in any hospitals, reforms, or other charitable institutions, then or *thereafter* situated or established in the parish.

The effect of that clause is, that no burthen shall be imposed upon the parish by reason of the existence within it of such institutions as contribute nothing to those burthens. The question then is whether Bethlem Hospital is an institution which, independently of the act of parliament, would be rateable.

The site of the Hospital was transferred from Bishopsgate to the respondent parish under stat. 50 G. 3, c. cxcviii., passed a few months subsequent to the act for regulating the rating to the poor of the parish already referred to. The hospital is of royal foundation, for the reception, maintenance and cure of *lunatics: and the appellants are, by a charter of King Henry VIII., constituted Masters, keepers, [*864 and governors of the hospital, and are, as such, possessed of lands and other property for the support of it. For some of the incurable patients payments towards their maintenance are made by their friends or parish officers, and for criminal lunatics by Government; but in no case is so much paid as to afford any profit. The appellants themselves are mere trustees under the charters and the act of parliament, having no beneficial interest whatever themselves in the premises, and being bound to dispose of the funds of the hospital, from whatever source derived, for the purposes of the charity. It has been long settled that unless there is a beneficial occupation the premises are not rateable. The actual occupants, the lunatics and the keepers and servants who attend them, are clearly not rateable as occupiers; and it was decided in the case of *St. Luke's Hospital*, 2 Burr. 1053, and *St. Bartholomew's Hospital*, 4 Burr. 2435, that the governors of hospitals, not de facto occupiers, were not rateable, and that in those and similar cases there was no rateable occupier. But it was said that, in the present case, the terms of the act of parliament under which the rate was made did not require actual occupation, for that, if the persons assessed held, used, or possessed the premises, it was enough; and no doubt such are the terms of the act of parliament; but whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing or using them must *be beneficial* to the parties so rated. It has been settled by several cases *that the possessors, or occupiers as trustees, of property otherwise rateable, the profits of which they [*865 were bound by act of parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property; *Rex* v. *Commissioners of Salters' Load Sluice*, 4 T. R. 730; *Rex* v. *Liverpool*, 7 B. & C. 61; *Rex* v. *The Trustees of the River Weaver Navigation*, 7 B. & C. 70, note (*c*).

The general rule of law upon the subject is stated by Lord ELLENBOROUGH in *Rex* v. *Terrott*, 3 East, 506, 513, and adopted by the Court in *Regina* v. *Shee*, 4 Q. B. 15. "The principle to be collected from all the cases on the subject is, that if the party rated have *the use* of the building or other subject of the rate as a mere servant of the Crown, or of any public body, or in any other respect for the *mere exercise of public duty therein*, and *have no beneficial occupation of or emolument resulting from it in any personal and private respect*, then he is not rateable." If this rule is applicable to the present case, the appellants would not be rateable. They possess and use the premises in the exercise of a public duty, and have no beneficial occupation of or emolument resulting from it in any personal or private respect.

But it was said that the present case was not within the general rule, but came within the distinction taken in *Rex* v. *Agar*, 14 East, 256, *Rex* v. *St. Giles, York*, 3 B. & Ad. 573, and *Regina* v. *Sterry*, 12 A. & E. 84. In the case of *Rex* v. *Agar* the pews in the chapel sought to be rated were let at a rent, and the profits were applied to repairs and salaries of preachers, &c. In *Rex* v. *St. Giles, York*, a profit *was derived from wealthy patients, and the income exceeded the expenditure, so that a fund accumulated. In both these cases an *actual* profit was made from the occupation, and the disposal of the funds was not controlled by any statute or royal charter. They were institutions of a *private* and not of a public character. In the present case no profit is made at all, and the poor generally, and not of any particular place or district, are entitled to the benefits of the Hospital, as far as they can be afforded. These cases, therefore, are clearly distinguishable.

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The case of *Regina* v. *Sterry* was strongly relied upon by the respondents, who contended that, although the benefits of the Hospital are in the first instance open to all poor persons not deemed incurable, for whom there might be room without payment, yet that, as payment was made for *some* of the patients received as incurable, though not to an amount leaving any profit, the occupation or possession of the appellants must be deemed beneficial, as decided in that case. That case, however, is distinguishable also in most important particulars. In *Regina* v. *Sterry* *no person* was admitted to the benefit of the institution who could not pay 12*l.* a year: the institution was *private*, limited to the Society of Friends, and in no sense could be considered a public charity. The object of the institution of Bethlem Hospital is the gratuitous reception and maintenance of lunatic paupers. The charity is open to the public generally. The reception of criminal lunatics maintained by Government is in the public service: and the receiving in *some* cases a contribution from parishes and friends of incurable patients, *applied as it must be to the general funds and public purposes of the hospital, makes this an intermediate case between those which have

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been decided; but does not, we think, take it out of the general rule applicable to public charities.

The case of *Regina* v. *Trustees of Taunton Market*(*a*) was also relied upon for the respondents. In that case the parties rated were trustees under an act of parliament which directed them to dispose of the funds they received from the market for the benefit of a particular parish in Taunton, by binding out poor children of the parish as apprentices. The Court, however, were of opinion that this was not a public purpose, but merely for the partial benefit of another parish than that in which the premises were situate, and for the relief of the poor of which the rate was made. It would in effect be assisting one parish at the expense of another, if the trustees were held not rateable.

It is not easy to reconcile all the authorities or to apply all their distinctions to such a case as that in question, which differs in many essential particulars from all the cases that were cited in the argument. Upon the whole, however, we think that, notwithstanding the payment in some instances made in the case of incurable lunatics, this is a public charity instituted by royal charter for public purposes, and that the appellants are occupiers or possessors for public purposes only, and, therefore, not rateable to the poor in respect of their occupation or possession of the hospital.

The case of the same appellants against the same respondents in respect of the rating of Bridewell *Hospital does not differ in [*868
principle from that of Bethlem Hospital: and we have come to the same conclusion in both cases in substance upon the same grounds.(*b*)

Order of Sessions confirmed.(*c*)

(*a*) 6 Q. B. 787, as *Regina* v. *Badcock*.
(*b*) See *Tracey* v. *Taylor*, 3 Q. B. 966.
(*c*) Reported by H. Merivale, Esq.

The two following cases, decided in Easter Vacation and Trinity term, 1849, may conveniently be inserted here.

The Churchwardens and Overseers of the Poor of the Parish of BIRMINGHAM *v.* SHAW and MELSON, Esquires, and WILLIAMS.

[*Feb.* 8, 1849.]

A Society, called "The Birmingham New Library," was instituted for the purpose of taking in books and periodicals, to be read by any person choosing to become a subscriber; every subscriber to pay two guineas on becoming a member, and 20*s*. in advance annually; and to have the power of transferring his property in the library to any person who should submit to the laws of the Society; no dividend, gift, division, or bonus in money to be made to or between any of the members.

Held, 1. That, to constitute a society supported by voluntary contributions, within stat. 6 & 7 Vict. c. 36, it was not necessary that the contributions should produce no kind of return to the contributors; and that neither the right given to every subscriber of transferring his share, nor the contingency that, whenever the Society might dissolve itself, there would ensue a division of its property among the members, made the Society other than a society within

sect. 1, viz. a society which "shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members;" and that the occupier of buildings used for the purposes of the Society was, under the above statute, exempt from poor rate.

2. That a person exempt from poor rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and can not bring an action for a levy made to enforce such rate, not appealed against.

MILLER, in Michaelmas term, 1848, obtained a rule(*a*) calling upon Messrs. Shaw and Melson, two of the justices for the borough of Birmingham, and Richard Williams, President of the Society called "The Birmingham New Library," to show cause why *the said justices *869] should not issue their warrant or warrants of distress to levy the amount of arrears of certain rates, made for the relief of the poor of the parish of Birmingham, in the said borough, due and payable by the said Williams, in respect of certain premises occupied by him within the said parish and borough, and designated as "The Birmingham New Library;" or why a mandamus should not issue directed to the said justices, commanding them to issue their warrant or warrants as aforesaid.

The affidavit on which the rule was obtained stated that in ten rates, duly made for the relief of the poor of the parish of Birmingham, the first of such rates having been made in December, 1843, and the last in April, 1848, R. Williams, the president of a society called "The Birmingham New Library," and the occupier of certain buildings used by that Society, was duly rated in respect of the said buildings in each of the said rates. That the Society was an institution which for some years past had used the said buildings for the purpose of taking in books and periodicals, which were read by any person who chose to become a subscriber to the institution; and that such buildings were used by such persons for the purpose of keeping the said books, and conducting therein the business of the institution. That proceedings to enforce payment of these rates, to which the Society disputed its liability, had been delayed on account of the pendency of *Regina* v. *Phillips*, 8 Q. B. 745, in which similar points to those in the present *870] case were involved. That after the decision of *that case a summons was taken out against Williams, who appeared by attorney before Messrs. Shaw and Melson, two justices for the borough, to show cause why payment of the rates should not be enforced by distress; and that on this occasion the only point of dispute was whether Williams was entitled to exemption as representative of a literary society within the meaning of stat. 6 & 7 Vict. c. 36: it being then admitted that the rules of the Society had been duly certified by the barrister under that act in April, 1845, and that the other formalities of the second section had been complied with; and that no appeal had been made, under the sixth section, against the barrister's certificate. The affidavit further stated that no appeal had been made against any of

(*a*) Under stat. 11 & 12 Vict. c. 44, s. 5.

the rates; and on this ground, and also on the ground that the Society was not supported by "voluntary contributions" within the statute, it was contended before the justices that they were bound to enforce payment of the rates. That the justices decided upon enforcing payment of the first four rates, the same having been made before April, 1845, when the rules of the Society were certified, but dismissed the application with respect to the subsequent rates. A copy of the rules of the Society was annexed to the affidavit.(*a*)

*The case was argued in Hilary term (January 15th), 1849.(*b*)

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Hill and *Mellor* showed cause. The purposes of this Society will be admitted to be exclusively literary, and therefore within stat. 6 & 7 Vict. c. 36; so that *Regina* v. *Jones*, 8 Q. B. 719, and *Regina* v. *Pocock*, 8 Q. B. 729, where the chief controversy was on this point, do not apply. It will be objected, however, that the Society is not supported by "voluntary contributions," because payment of them may be enforced against subscribers. But sect. 1, in requiring that a society, as a condition of its immunity, shall be "supported wholly or in part by annual voluntary contributions," means no more than that it must *not be supported by grant, or endowment, or revenues of its own. Even if payment of subscription may be enforced, a point which, in law, is very doubtful, and, in fact, can hardly arise, as the subscription is payable in advance, still the subscription itself is voluntary at the beginning of each year.

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Secondly. The new rule, by which any dividend or bonus among the

(*a*) The following rules were referred to in the argument.

I. "Every person, when admitted a member of the Society instituted for supporting this library, shall pay the sum of two guineas. Having paid the fee of admission, as above directed, he shall receive a printed ticket, with a number upon it, signed by the president. He shall likewise pay the additional sum of twenty shillings in advance, towards the expenses of the current year. But if his subscription shall commence between the first of July and the first of January the additional sum shall be only ten shillings; afterwards the sum of twenty shillings shall be paid annually by every subscriber on the first of January; and he shall not be entitled to the use of a book till he has paid such additional sum, either to the treasurer or to the librarian.

II. "If any person shall suffer his annual subscription of twenty shillings to remain unpaid three months after the general meeting in January, he shall receive a notice from the librarian to remind him of it, in which the librarian shall at the same time inform him, that he will be deprived of all the privileges of a subscriber till the subscription be paid.

III. "Every subscriber shall have the power of transferring his property in the library, by any of the methods by which personal property is usually transferred, to any person who shall submit to the laws of the society.

IV. "Persons to have the use of the library under the same laws and regulations as annual subscribers, on payment of 6*s*. 6*d*. per quarter, upon depositing the value of the book taken out of the library, or upon recommendation from a subscriber; but no quarterly subscriber to be entitled to any privilege, except use of the books."

VI. A general meeting to be holden annually, &c. "At this meeting all laws for the regulation of the Society shall be made; and all questions shall be determined by a majority of two-thirds of the subscribers present."

At the annual general meeting held in January, 1845, the following new rule was made.

"That no dividend, gift, division, or bonus in money, shall be made unto or between any of the members of this institution."

(*b*) Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

members of the Society is prohibited, is in exact compliance with the requirements of the first section, and is not qualified by Rule 8, under which power is given to every subscriber to transfer his property in the library. For the individual members of every unincorporated society must necessarily possess an interest in its property; and, as any person may become a subscriber on payment of two guineas, no share can ever be sold at a premium.

Thirdly. It will be contended that the liability to these rates cannot now be disputed, because they have not been appealed against. But it was not necessary to appeal against them; for the objection is, not to the quantum, but that the rates are a nullity. Sect. 1 of the statute provides that "no person or persons shall be assessed or rated, or liable to be assessed or rated," in respect of buildings there described. By barrister's certificate the Society's buildings were, in effect, taken out of the parish for purposes of rateability. Trespass or replevin might have been maintained if these rates had been enforced by distress: and it is only where the sessions have exclusive jurisdiction, so that their judgment as to the validity of a rate would be final, that an appeal is necessary. If a person is assessed for property not in his occupation, he is not confined to his remedy by appeal, but may bring an action; *The* *873] *Governors of *Bristol Poor* v. *Wait*, 1 A. & E. 264: and it would be no ground of defence that the sessions on appeal had confirmed the rate; *Milward* v. *Caffin*, 2 W. Bl. 1330. In *Marshall* v. *Pittman*, 9 Bing. 595, where it was held that replevin would not lie, although a party having no stock in trade was rated for it, the objection was to quantum; for he was legally rated for other property.

Miller, contrà. First. The result of all the authorities is, that, where a person occupies property apparently rateable within the parish, it is a question for the magistrates exclusively, whether he is rateable or not, and that his only mode of contesting his liability is by appeal. In the cases first cited there was no such occupation for the justices to act upon. *Hutchins* v. *Chambers*, 1 Burr. 579, *Fawcett* v. *Fowlis*, 7 B. & C. 394, and *Rex* v. *Trecothick*, 2 A. & E. 405, support the view contended for.

Secondly. It is said that the contributions to this Society are voluntary, because it is quite at the option of any person whether he will subscribe or not. But every subscription to a railway or other company is voluntary in the same sense. It is clear that voluntary in the statute means gratuitous, and that the subscription must not entitle the subscriber himself to any personal benefit. Again, if a subscriber has had any benefit from the library, a contract to pay arises, and he may be compelled to pay, in which case his contribution would, certainly, not be voluntary.

*874] Thirdly. The new rule, by which any "dividend, gift, division, or bonus" among members of this *institution is prohibited, is incon-

sistent with the third rule, which gives power to every subscriber to transfer his property in the library: and it is also futile; for the Society has, of course, the right to dissolve itself; and in that case there would necessarily ensue a division of property among its members.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered judgment.

This was a rule for a mandamus to justices of the peace, to enforce by warrant of distress the payment of certain poor rates, assessed on the president of a society called "The Birmingham New Library," as the occupier of certain premises which he holds for the purposes of the Society. On the one hand, the rates have been duly made and allowed, and there has been no appeal against them; on the other, the institution had received before the making of the rates the barrister's certificate, which has not been appealed against. Two points were made in support of the rule: the first, that the constitution and purposes of the Society did not bring it within stat. 6 & 7 Vict. c. 36; the second, that, even if the Society were entitled to the exemption given by that statute, such exemption should have been made the ground of appeal against the rates; which not having been done, it was too late to resist the payment.

To bring a society within the exemption, it must, among other things, be "instituted for purposes of science, literature, or the fine arts exclusively," must be "supported wholly or in part by annual voluntary contributions," and it must be one, which "shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members."

*This institution is formed for the purpose of creating and maintaining a library, or collection of books, which the members [*875 are to have the use of, either in the room, or at their own houses under certain regulations. The benefits of the institution, without however all the rights of membership, are extended to certain other persons on other terms. It is difficult to deny that the purpose of the Society is merely literary; nor, indeed, was this much contested in the argument; but it was said that it was not supported wholly or in part by annual voluntary contributions. It is certainly supported mainly by certain sums paid on admission of subscribers, and their annual subscriptions; but these last are said not to be voluntary. It is, perhaps, not easy to determine what the legislature intended by the word "voluntary" in this combination. In several cases which have come before us different suggestions have been made; but it has never been necessary expressly to decide the point. Upon consideration, we think that annual contributions will satisfy the condition required, if they commence of the party's own choice, are so continued, and may be withdrawn at pleasure, that is, without subjecting the party to any legal liability, or forfeiture beyond that of foregoing a participation in the pleasure or profit, scientific, literary or artistic, in respect of which they have been made. If the con-

tributor was free to commence his contribution, and incurs no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership, in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor, unless we add something to the idea of
*876] voluntariness, *which in ordinary language it does not import. And that is what, in fact, is done by those who contend that it must be also gratuitous and bring no return of any kind to the contributor; against the addition of which particular qualification there is the further reason that the statute itself, in the clause next to be considered, provides for this expressly, and so seems to exclude the notion of its being previously implied. In the present case it is clear that the commencement of subscription is purely voluntary: and, as the payment, by the first rule, is in advance, no rights legal or equitable can be acquired by the Society against the contributor to enforce a second year's payment, by reason of any uses of the room or books during the first. As to the second year, in case of non-payment, the second rule provides that being in arrear for three months is to deprive the subscriber of all privileges of membership until the arrear paid. This, therefore, seems to measure the rights of the parties; the member is allowed, for three months, during which no payment is made, to continue as before, and then he loses all privileges; but the Society acquires no rights against him.

We proceed, then, to consider the third requisite. Now we find that the Society, at an annual general meeting in January, 1845, prior to the rates made, or the barrister's certificate granted, passed a rule exactly in the words of the statute: no question, therefore, can arise, unless they have retained some rule which is inconsistent with this, and can still be acted on, or they do, in fact, make some dividend, gift, division, or bonus in money to or between any of the members. This latter point was not contended for; but the third rule was insisted on, by
*877] which every subscriber has the *power of transferring his property in the library by any of the methods "by which personal property is usually transferred, to any person who shall submit to the laws of the Society." This is, clearly, no contravention of the rule before referred to, even if it be assumed that by accumulation the common stock of the Society increases in value, and that the present members be considered in some sort a proprietary body, and the respective shares of the members of that body to be increasing in value, and to sell at a premium; still the profit which any one might make by a transfer is no dividend, gift, division, or bonus, which the Society makes among its members or to any one of them; the common stock remains after the transfer exactly as it was before; only there has been the substitution of a new member for an old one. But, so far as the affidavits disclose, there is nc limit to the number of members; any person, upon payment

of the fee and subscription, may become a member; and so the whole assumption of a premium on transfer practically falls to the ground.

It was however insisted, further, that the Society might dissolve itself by resolution at an annual general meeting, and so a division might be made. There is no provision made in the rules for dissolution; and therefore it cannot be taken for granted that a dissolution could be made, *attended by a division of the common stock*, by a mere vote of the majority present at an annual general meeting: and it is the more doubtful, because, by rule 6, the functions of the annual general meeting are specified to be the making of all laws for the *regulation* of the Society; which presupposes its continued existence, and seems to exclude the power *of dissolving by a vote of the members present. But another and more satisfactory, because more general, answer to [*878 the objection is this; that the statute must have a reasonable meaning given to its words: when it says that the laws shall prohibit a division by the Society among its members, it must be taken to speak of laws which are to operate on the Society as a continuing body. No law of the Society can prevent its dissolution, and a consequent division of the common stock; for any law made for the purpose might, of course, be repealed by the authority which made it: this sort of division, therefore, the legislature did not intend to prevent, because it could not; and it has made its meaning clear by placing the word "division" with "dividend, gift," and "bonus in money," and by limiting the prohibition to the acts of the Society as such, towards its members as such, whereas the division now argued on would take place after the Society had ceased to exist. Upon the whole, therefore, we think that the Society is unquestionably brought within the exemption given by the statute, and that the barrister's certificate was properly granted; and we have gone into the several points at greater length, because the question is of very general application, and has not before received any decision.

We are driven, therefore, to consider the second ground on which the rule is supported, whether namely, *as regards the present rates*, the Society is deprived of the benefit of its exemption, because it has not appealed against them. And, as it cannot be successfully contended that the president might not have appealed, the question is narrowed to this, whether, there being a remedy by appeal, and that remedy passed by, the law *will allow an action to be brought for the enforcement [*879 of a rate, good on its face, and made by a competent authority, on a person, and in respect of the occupation of property, apparently within the jurisdiction of that authority. This is not a new question; nor is the principle of decision unsettled or difficult. The only difficulty lies in its application. The right of appeal is coextensive with the operation of the rate. Whether it has defects which make it even a nullity in law, or be objectionable only as excessive in amount, or unequal in its assessment, any one who is grieved by it may appeal; but the

right of action is limited, as well for the sake of convenience, as on principles of law and justice. The making and allowance of the rate are acts entrusted by the law to certain functionaries, the overseers and the justices; and the exercise of their functions is subjected by the law to revision by a court of appeal. If, in the exercise of their functions, but acting within their jurisdiction, they do an erroneous act, it is no more null and void, while unquestioned by appeal, than an erroneous decision of this Court on a matter within its jurisdiction while unquestioned by a writ of error. If it be appealed against, the law has made the decision of the Court of appeal final; and, if that Court confirmed the act of the inferior functionaries, however confessedly erroneous that decision might be, it would be conclusive for all purposes, and, among others, for enforcement; else this absurdity would follow, that a rate, which the Court of direct and final jurisdiction had pronounced valid, must be considered as invalid when considered collaterally in any other Court as the protecting authority for the officer of the law who was directed to enforce it. And to this extent there *can be no difference between the case of a rate not appealed against and one appealed against and confirmed. The authority of the original Court up to the time of appeal, and subject to that, is exactly of the same force as that of the Court of appeal; both stand on exactly the same principles. They are the acts and decisions of functionaries, or Courts, entrusted by the law, on matters within their jurisdiction.

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But all this depends on that limitation of jurisdiction: if in the first instance the primary court has gone beyond those limits, its act is void. The party grieved may, if he please, appeal, because the statute enables him to do so, and excess of jurisdiction is in itself a ground of appeal, as much as merely erroneous decision. And, if the court of appeal erroneously confirms the act of the court below, it may be that the party appealing cannot object to the want of jurisdiction, in any collateral proceeding: his own act may estop him personally. But, in the case supposed, he is not bound to appeal, because he is at liberty to treat the act as void. We have examined all the cases cited in the argument, and more: we do not now go through them in detail, on account of the necessary length to which our judgment must extend: but these principles will be found either laid down or assumed in them all, when properly considered, with exact uniformity.

The question then in this case is, whether the acts of the overseers and justices in assessing the president to these rates were within their jurisdiction: if they were, they are valid now, because not reversed on appeal, and he cannot question them collaterally; if they were not, they were ab initio null and void, and he has done nothing which estops him from saying so. Now it is *not disputed that he was the occupier of the premises in respect of which he is rated, nor that they are within the parish, nor is any question made as to the beneficial nature

*881]

of the occupation; but the objection is that the statute exempts from the rate by reason of the purposes for which the occupation is had; and it is said that the effect of that exemption is to take the premises, for the purpose of rating, out of the parish, and so out of the jurisdiction of the justices, who are only allowing a rate made for the parish. But we think this mode of stating his case cannot be sustained; if it could, the same mode might be adopted wherever the question was, whether the occupation was beneficial or not; if there be no beneficial occupier, the land for the purposes of the rate might equally be said not to be within the parish, because it ought not to be included in the rate; yet, so far as we know, this question has always been raised on appeal; and the distinction has been between the question, Whether occupier or not absolutely, which has been tried by action, and, Whether beneficial occupier or not, which has been tried by appeal. And this seems the reasonable test. As soon as the land is shown to be in the parish, and A. B. to be the occupier, the case is primâ facie brought within the statute of Elizabeth, the rate on its face is good, and jurisdiction attaches: whether that primâ facie case can be answered by any circumstances affecting the character of the occupation, is matter to be determined by the court of appeal, on appeal made. In the present case, the party rated had many facts to prove, and a construction of the statute to make out, before he could establish his exemption; and the decision upon all those points was within the jurisdiction of the court of appeal, and, *when decided in his favour, still showed no excess of jurisdiction in the [*882 court below, any more than a decision that the rate made and allowed was unequal: whereas a decision that the land was out of the parish would have shown that, ab initio, the overseers, and the justices below, had been dealing with what they did not profess to deal with, and could not by law interfere with.

The case of *Fawcett* v. *Foulis*, 7 B. & C. 394, an analogous case in respect of highways, illustrates the distinction we are taking, very clearly. Arncliffe and Ingleby were townships in the parish of Arncliffe; the plaintiff, an occupier of lands in the former, contended he was not bound to repair the roads in the latter; and, his cattle having been seized on a conviction founded on the information of the *parish surveyor*, against which he had not appealed, he brought an action of trespass, and was nonsuited. The Court held the nonsuit right. Lord TENTERDEN said: "For some time I was disposed to think this case analogous to some that have arisen on the poor laws, in which it has been held, that if a person *not an occupier, or resident* within a given parish be there rated to the relief of the poor, and his goods are distrained for the rate, he may maintain an action against the party levying. But in those cases, *there was an entire want of jurisdiction*. Here the justice had jurisdiction to hear and decide upon the complaint of the surveyor, and the present plaintiff, as an occupier of lands within the parish, was *primâ facie*

liable to the burden." And HOLROYD, J., said: "if there had been separate surveyors for the townships of Arncliffe and Ingleby, and *the surveyor of the latter* had directed *work to be *done in* Arncliffe as if it were in Ingleby, then upon a complaint made of the neglect to do it, the magistrate would have had no jurisdiction."

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Marshall v. *Pitman*, 9 Bing. 595, was decided on the same principle. The plaintiff was rated as an inhabitant on his stock in trade: he did not appeal, but brought an action, contending that he was not liable to be rated, *because he had no ability, that which was supposed to be stock in trade not being so in fact;* but the Court held the action not maintainable; his inhabitancy and the possession of visible personal property giving jurisdiction to the magistrates.

We entirely acquiesce in the convenience and justice of the principle on which these decisions proceed, and are, therefore, of opinion, that the payment of the rates in question cannot now be resisted.

Our decision upon this point alone would have been sufficient to make the rule absolute; but, as that would have left the general question upon the construction of the statute unanswered, we have thought it better to express our opinion on both the questions raised in argument.

Rule absolute.(a)

(a) Reported by H. Davison, Esq.
See the next case.

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*The QUEEN *v.* The BAPTIST MISSIONARY SOCIETY.

[*June* 9, 1849.]

The Baptist Missionary Society were assessed to a paving rate, made under 57 G. 3, c. xxix. (Metropolitan Paving Act), as occupiers of a house and premises, the property of the Society. The Society is founded with the object of sending out missionaries for the conversion of the heathen. It is chiefly supported by voluntary contributions, and in part by the interest of a fund; and no member derives any private advantage from his connection with it.

The premises comprise various apartments, the whole of which are required for the purposes of the Society, but which are at times used by other societies of the same nature, who, in return, contribute a part of the expense of the lighting, warming and cleansing of the premises; but the sum so contributed does not exceed the expense incurred in consequence of their use of the premises. The Society prints reports and periodicals, which are stored on the premises, and occasionally sold there, but at less than their prime cost; the proceeds of such sales being carried to the credit of the Society.

Held that the rate was good, for that there was, under the circumstances, a beneficial occupation by the Baptist Missionary Society.

Semble, That persons occupying premises merely for religious ends are not, on that account, exempt from poor rate.

ON appeal against a paving rate, made as after mentioned, the sessions confirmed the rate, subject to the opinion of this Court upon the following case.

This was an appeal against a rate or assessment made pursuant to an order of the Commissioners of Sewers of the City of London and Liberties thereof, bearing date 1st April, 1845, and made in pursuance

of the several statutes now in force authorising the same: but no question is intended to be raised in respect of the form of the rate.

The premises assessed are a large house in which the business of the Baptist Missionary Society is transacted: and the whole of the building was erected, at a cost of 4,000*l.* besides the purchase of the freehold, partly by the sale of stock of the Society sold out of the funds, and partly by money contributed by members of the Baptist Missionary and other societies connected with the Baptist body. The whole is the property of the Society: but other religious institutions connected with *the Baptist body, in consequence of the contributions of their friends, make use of the premises for the purposes of their respective societies, so far as the convenience of the Baptist Missionary Society allows. [*885

The Baptist Missionary Society has been established about fifty years; its objects are the sending out and supporting Missionaries for the purpose of the conversion of the heathen in various parts of the world. The Society is entirely supported by voluntary contributions, except a fund of 20,000*l.*, the interest of which they devote to the widows and orphans of the Missionaries dying abroad, and two funds remitted from Calcutta to be applied to preaching abroad. The whole of its income, amounting last year to 25,000*l.*, with this exception, is devoted to the purposes above mentioned; and no member derives any private advantage whatever from his connection with the Society.

The building comprises various apartments: a board room, where the board of management and the subscribers are accustomed to meet; a secretary's room; a library, or room for annual meetings of members; committee room; and various salaried clerks' offices.

The Society employs a secretary, an accountant, three clerks and a porter; prints a report and other periodicals, and sells them, if applied for, occasionally on the premises; and has amongst its regulations a rule for investing their surplus fund, if any.

The whole of the house is required for the business of the mission, though there are times when it may be and is used by other societies, without interfering with the Society in question.

The clerks attend daily during a portion of the day, and leave the premises in the evening, which are locked *up by the servants of the Society, who live in a small house in the rear of the main building, situate on the same plot of ground, but wholly detached from the main building, and having a separate entrance; but the whole within one fence, and forming part of one establishment. The small house contains four rooms, furnished by the occupant, viz. a kitchen, a sitting room and a bed room occupied by the porter, rent free, as connected with their service, and which is considered as part of his remuneration; and a room used by the Society as a store room. No one sleeps in the main building. Eleven other societies connected with the Baptist de- [*886

nomination, some of which contributed to the building of the house, amongst others the Baptist Irish Society, occasionally, and two of them about three days in the week, use some parts of the building for the purpose of holding their meetings and keeping their books: but these societies are all purely charitable; and no member of them has any private benefit from the occupation of any part of the premises; but the Baptist Irish Society carry on their business on these and no other premises; they have a different organization, distinct officers and committees, and pay a proportion of lighting, firing and cleaning, 1-12th, 23*l.* per annum; the other 11-12ths are divided amongst the rest of the societies using the premises.

In one of the rooms are deposited 3000 or 4000 volumes of books consisting of history, philosophy, and works on the Hindoo religion, no profit being made by any one from the use of them.

The sum of money paid to the Society, by each of the other societies thus accommodated, for gas, fire, cleaning and attendance, is equal to the expense incurred by the Society, on behalf of each, but not more.

*887] *It appears also that the reports and other periodical works of the Society, which are printed for the use of the members, are sold, when applied for; the proceeds of which sale are carried to the credit of the Society, but do not cover the original cost.

For the appellants, it was contended that there was in this case no beneficial occupation of the premises, and therefore no liability to the poor rate; and that, as under stat. 11 G. 3, c. 29, s. 41,(*a*) the rate in question is directed to be made "upon all and every person and persons, who do or shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenement or hereditament within the said several wards, and who, by the laws now in being, are, or shall be liable to be rated towards the relief of the poor, in the respective parishes where he, she, or they shall respectively live or reside," the Baptist Missionary Society was not liable to the present rate; and it was contended that the rate could not be supported under the Metropolitan Paving Act, 57 G. 3, c. xxix.,(*b*) s. 24, because the preamble and various provisions of stat. 4 G. 4, c. cxiv.,(*c*) contained a legislative declaration that the powers given to the commissioners for paving, &c., the city of London by stat. 11 G. 3, c. 29, s. 41, so far as regards the making of the rates, were neither enlarged nor affected by stat. 57 G. 3, c. xxix., s. 24.

*888] *The Court was of opinion that, without any beneficial occupation of the premises, the rate might be supported under stat.

(*a*) "For consolidating," &c. "the powers granted by several acts of parliament, for making, enlarging," &c. "the vaults, drains, and sewers within the city of London, and liberties thereof; and for paving, cleansing, and lighting the streets, lanes," &c.; "and preventing and removing obstructions and annoyances within the same."

(*b*) Local and personal, public: printed in the Statutes at Large.

(*c*) Local and personal, public: printed in the Statutes at Large.

57 G. 3, c. xxix.; under which act, as well as under stat. 11 G. 3, c. 29, it purported to be made.

The Court was also of opinion that there was, by means of the occupation of the smaller house, and by the sums received by the Baptist Missionary Society from the other societies for gas, fire and attendance, a beneficial occupation to some extent; and that, under the words of stat. 11 G. 3, c. 29, s. 41, a beneficial occupation to any extent would render the whole premises liable to the rate. The Court, therefore, confirmed the rate, subject to the opinion of the Court of Queen's Bench.

If this Court should be of opinion that the commissioners can rate only premises of which there is a beneficial occupation, and that there is no beneficial occupation whatever of the premises in question, the rate and the order of sessions confirming it were to be quashed. If this Court should be of opinion that there is, to some extent, a beneficial occupation of the premises, and that, by means of the provision in stat. 11 G. 3, c. 29, s. 41, the premises are liable to be rated only to the extent of such beneficial occupation, then the rate was to be reduced to 100*l.*, which the sessions found to be the value of that beneficial occupation. In any other case, the order of sessions and the rate were to stand confirmed.

The case was argued in this term.(*a*)

Sir *J. Jervis*, Attorney General, and *Clarkson*, in support of the order of sessions. This rate is made *under the provisions of the several local acts mentioned in the case. It is not disputed by the other side that, if the Society are liable to the poor rate, they are also liable to this rate; and the first question, therefore, is, whether the occupation described in the case is such as to be a beneficial occupation making them liable to the poor rate. If the Court are of that opinion, it is decisive; if the Court are not of that opinion, there will arise a second question, as it is contended that the language of the local acts is such as to make the premises liable to this rate, even if they are not liable to the poor rate. [*889

First, then, as to the question whether the occupation is beneficial so as to make the premises rateable to the poor rate. That is a question of fact, not of law: and the Quarter Sessions have found, in fact, that it is so, upon evidence, stated in the case, fully justifying the finding. Part of the premises is occupied by servants of the Society as part of their remuneration; part is used by other societies who pay money for such use: whether the occupation be profitable or not is no test; it is a beneficial occupation, if it diminishes the amount of outlay, though the expenditure, on the whole, exceed the receipts: part of the premises is used as a warehouse for books, which are sold at less than their prime cost, it is true, but still for money. These facts bring the case precisely within the decision in *Regina* v. *Sterry*, 12 A. & E. 84. In that case,

(*a*) May 26th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

the premises were used, at a loss, as a cheap school. Here the premises are used as a cheap warehouse for the export of books for sale. What
*890] difference is there in principle between the receipt *of money from the pupils, inadequate to meet the expenses of the school, and the receipt of money from the sale of books, inadequate to meet the expenses of the establishment? In each case, the occupation is beneficial, though in neither case is there profit: the benefits in each case go in aid of a charity; but in neither case does that exempt the premises from the rate. The appellants rely on the case *Regina* v. *Wilson*, 12 A. & E. 94: there is some difficulty in seeing how in that case the appellant Wilson could be said to occupy the premises at all: it is on that ground, if any, that the case must be supported; and that ground is excluded in the present case, by the agreement of the parties. There is, however, a marked distinction between the facts in *Regina* v. *Wilson*, and those in the present case: there the important fact of money being received directly from the occupation of the premises was not found.

(The argument on the construction of the statutes is omitted, as the Court pronounced no opinion upon it.)

Butt and *Prendergast*, contrà. The question, however, whether or not there was a beneficial occupation of these premises, is not decided by the Quarter Sessions in this case as a matter of fact; it is referred to this Court to decide whether the facts stated in the case amount to a beneficial occupation; *Rex* v. *Field*, 5 T. R. 587. Unless there was a beneficial occupation such as would make the appellants liable to the poor rate, they are not liable to this rate, under the local acts.

(Their argument on the construction of the statutes is omitted.)

*891] *The use to which the premises are applied is such that there is no occupier rateable to the poor rate; *Rex* v. *St. Luke's Hospital*, 2 Bur. 1053; *Rex* v. *St. Bartholomew*, 4 Bur. 2435; *Rex* v. *Woodward*, 5 T. R. 79. These cases lay down the principle that whenever the persons who substantially occupy the premises are objects of charity they are not rateable. In *Rex* v. *St. Luke's Hospital*, Lord MANSFIELD grounds his judgment on the fact that no occupiers could be found except the insane patients: here the heathens, who are the object of the missionary undertakings, stand in the same situation. *Regina* v. *Shepherd*, 1 Q. B. 170, illustrates the same principle. *Regina* v. *Wilson*, 12 A. & E. 94, however, is the case most in point. The facts in that case were almost identical with the present. That decision was, in truth, but a repetition of *Rex* v. *Waldo*, Cald. 358. In *Regina* v. *Sterry*, 12 A. & E. 84, the appellant was no more than a cheap schoolmaster [COLERIDGE, J. That is precisely the Attorney General's argument: he says that Mr. Sterry was, from laudable motives, a cheap schoolmaster, and that you, from laudable motives, are a cheap bookseller and warehouseman.] In *Regina* v. *Wilson* it is stated (12 A. & E. 96), in

the case, that the premises contain "several store rooms in which various articles intended for exportation in furtherance of the society's objects are deposited." If the argument just alluded to is good here, *Regina* v. *Wilson* was wrongly decided. [COLERIDGE, J. Was more decided in that case than that Mr. Wilson, the secretary, was not an occupier, and, therefore, that *he* was not rightly *rated? [*892 ERLE, J. There are two quite separate questions,—Whether any person can be rated? and, Whether the right person is rated? COLERIDGE, J. *Regina* v. *Wilson* and *Rex* v. *Waldo*, if to be supported at all, must be supported on the ground that the person rated did not occupy the premises.] *Regina* v. *Wilson* cannot have been decided on that ground: the question there referred to the Court was, whether the Society was liable to be assessed to the poor rate: the argument in support of the poor rate commenced by stating that it was agreed that no distinction should be taken between the Society and the treasurer: and in the case on the church rate, which was argued, in *Regina* v. *Wilson*, together with the first, the rate was supported, though it also was made on the treasurer and not on the Society and the Society were said by the Court to be the occupiers: the case on the poor rate must, therefore, have been decided on the ground that the objects of the charity were the real occupiers, and that they were not rateable. Then it is said that the receipt of money makes a difference; and *Regina* v. *Sterry* is relied on. That case was cited in *Regina* v. *St. George, Southwark*, antè, p. 852; but the decision there was that, if the objects of the charity, occupying the premises, were not rateable, the receipt of money (in substance by them) did not make them so. The question is whether the occupation is for a private or a public purpose; *Regina* v. *Badcock*, 6 Q. B. 787, 798: and *Regina* v. *Wilson* shows that the occupation here is of the *latter kind. *Regina* v. *Shee*, 4 Q. B. 2, was [*893 decided on the same principle. [ERLE, J. It was decided immediately after the case of *Regina* v. *Ponsonby*, 3 Q. B. 14, and fell within the class of cases in which royal property has been held not rateable, except in the hands of private occupiers: it was not decided on the ground that institutions for public purposes of beneficence were exempt from rate. Is the object of this Society for the benefit of some particular place or of the whole English dominions?] It is stated to be for the whole world: in every respect, the objects are the same as those of the society in *Regina* v. *Wilson*. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The question in this case was, whether the appellants have such a beneficial occupation of the premises, in respect of which they were rated, as would make them liable to the poor rate: and, upon consideration, we are of opinion that they have.

It is certain that they are the occupiers of a subject matter which, in the hands of an ordinary occupier, or even of the lessee of these appel-

lants, would make them subject to assessment: and it is not less certain that, if in the latter case the whole rent paid by the lessee were devoted by them, the owners, to religious or charitable purposes, the same consequence would follow. But it is said that, as their occupation, in fact, is one exclusively for such purposes, and as no member of the body
*894] receives any pecuniary benefit whatever from it, *it is not beneficial in the sense which the decisions on rateability under the poor law require: and several cases were relied on for this position, beginning with *Rex* v. *Waldo*, Cald. 358, and ending with *Regina* v. *Wilson*, 12 A. & E. 94.

In *Regina* v. *Sterry*, relied on by the respondents, we had occasion to express our regret at the necessity of deciding upon nice points of difference, which had followed in consequence of departing from the simple test which the mere occupation of a subject matter, valuable and beneficial in itself, would have afforded.

We feel the same regret now. But, at the same time, we have no doubt that there are circumstances here which distinguish this case from the two first cited and those which range under them, and bring it within the principle of *The Queen* v. *Sterry*.

The case finds that other societies occupy portions of the premises from time to time, and that such occupation or use is not afforded to them gratuitously, but that in return for it they, by contributions among themselves, in certain proportions, pay for the lighting, firing and cleansing of the premises. It is stated, indeed, that this payment is no more than is expended on these objects; that is, that the appellants make no profit by it: but there is nothing more clear than that that circumstance is immaterial: if there be substantially a rent or return of a beneficial nature for the use of the premises, it is enough. Nor is it material that these societies are of themselves of a religious and charitable character: if such bodies occupy premises as lessees rendering rent, they are clearly rateable for such occupation.

*895] *In addition to this, the appellants, it is stated, print a report, and other periodical works, which are stored on the premises, and sold there; these again, it is said, are sold under cost price, and the proceeds devoted to the general purposes of the Society. The same remark, however, applies as before: the price, whatever its amount, is in reduction of the outgoings of the Society, and is in its nature a valuable return. The appellants, therefore, to this extent, are carrying on a trade on the premises; and that they devote the returns to charity is immaterial.

As the counsel for the appellants relied principally upon the decision in *Regina* v. *Wilson*, 12 A. & E. 94, we have, in deciding against him, pointed out the facts distinguishing that case from the present: but we think it right to add that we find no authority or principle for holding that a number of individuals, occupying premises merely for the purpose

of diffusing religious instruction, would be, on that account, exempt from rateability in respect of them to the relief of the poor.

It is unnecessary, therefore, to consider the point made on stat. 57 Geo. 3, c. xxix.: nor is there any ground for distinguishing between the occupation of the whole or any part of the premises.

We confirm the order of sessions. Order of sessions confirmed.(*a*)

(*a*) Reported by C. Blackburn, Esq.

*LEWIS *v.* HOLMES. [*896

Proceedings in outlawry cannot be founded on a writ of ca. sa. made returnable immediately after execution according to stat. 3 & 4 W. 4, c. 67, s. 2.

ARCHBOLD obtained a rule to show cause why an order of ERLE, J., setting aside a writ of exigi facias obtained by the plaintiff in this cause, and other proceedings in outlawry, should not be rescinded.

Final judgment was signed on 20th November, 1845. The plaintiff sued out a ca. sa. on 7th July, 1846, returnable "immediately after the execution thereof," indorsed to levy 102*l.* 1*s.*, debt and costs. The sheriff was ruled to return the writ; and it was returned "non est inventus." The return was dated 20th January, 1847, and filed on the 21st. On 21st January the plaintiff sued out a writ of exigi facias, returnable 8th May. On 28th April defendant petitioned the Court of Bankruptcy under stat. 7 & 8 Vict. c. 96; and he obtained an order for protection on the following day. Up to this time, from December, 1846, the defendant had been absent from his place of business; and during this absence he had no notice of plaintiff's proceedings. On May 4th, he first became informed that a writ of exigi facias had issued against him, and attended at the Secondary's Office to render himself: but, being too late for that purpose, he was proclaimed an outlaw. He thereupon applied to ERLE, J., at chambers, who made the order in question. In the last term,(*a*)

**Dowdeswell* showed cause. Under stat. 3 & 4 W. 4, c. 67, s. 2, writs of ca. sa. are returnable "immediately after the execution thereof." But it was held in *Kemp* v. *Hyslop*, 1 M. & W. 58, S. C. Tyr. & G. 77, that such a writ is not returned so as to fix the bail by the return "non est inventus." (He also objected that the exigi facias ought to have been tested on the quarto die post, and should have been made returnable on some day in term, not being one of the last three days. But on these points the Court gave no judgment.) [*897

Archbold, contrà. In *Sandford* v. *Wyatt*, 2 Dowl. P. C. N. S. 2, this question was brought before WIGHTMAN, J., in the Bail Court, and *Kemp* v. *Hyslop* relied upon; but his Lordship refused to decide it on motion, and thought it should be tried by writ of error.

Cur. adv. vult.

(*a*) June 12th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

Lord DENMAN, C. J., in this vacation (July 7th), delivered the judgment of the Court.

In this case the plaintiff, having obtained judgment, issued a writ of ca. sa. on the 7th July, 1846, returnable immediately after execution, under stat. 3 & 4 W. 4, c. 67, s. 2. This writ was returned by the sheriff Non est inventus. The return is dated 20th January, 1847; but it was not filed till the 21st January. On the 21st January a writ of exigi facias issued, tested on that day, returnable on 8th May, being the last day of Easter term. The writ of exigi facias was set aside by an order of my brother ERLE; and this rule was obtained to review his decision. The objections to the writ are various.

*898] *First it is said that no proceedings to outlawry can be grounded on a ca. sa. returnable immediately after execution, as such writ can only be executed by arresting the defendant, in which case there is no ground for proceeding to outlawry. If he be not arrested, the writ does not become returnable: and the fact of its being returned cannot help, whether it be done by a Judge's order or not: for, strictly speaking, no writ can be returned before it is returnable, although a Judge may order the sheriff to return what he has done upon it, and so in some sense to return the writ. The Court of Exchequer strongly inclined to this opinion in *Kemp* v. *Hyslop*, which was a proceeding against bail after a similar writ of capias; giving also, as an additional reason, that, as the writ to fix the bail must lie four clear days in the sheriff's office, it ought to have a fixed return in order to enable the bail to know when to search the office; otherwise they must search from day to day from the time of the writ issuing.

We are of opinion that this is a fatal objection, for the reasons given in that case. Rule discharged.(*a*)

(*a*) Reported by H. Merivale, Esq.

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*899] *BLAGG *v.* STURT. [*Nov.* 16, 1846.]

1. *Held* by the Court of Queen's Bench, in an action for libel, that a letter to the Secretary of State, by an inhabitant of a borough, imputing to a person who is the town clerk, and clerk to the justices of the borough, corruption in the latter office, is not a privileged communication.
2. And that express malice may be proved by evidence that the imputation is in part false, even where the communication is of such a nature as to raise a primâ facie presumption of absence of malice.
3. *Held* by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that it is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it.
4. Where a declaration for libel stated that plaintiff was town clerk and clerk to the justices of a borough, that two persons were apprehended on a charge of embezzlement; and that defendant sent a letter to the Home Secretary, stating that the administration of justice ought to be above suspicion, that one of the above persons, who was taken before justices out of the borough, was defended by plaintiff, that the other, who was taken before the borough justices,

was defended by a friend of plaintiff, he himself acting as legal adviser to the justices, that the closest intimacy had long existed between plaintiff and the prisoners and that among the papers of one of them was found an enormous amount of accommodation bill transactions, plaintiff, and others with whom he is associated, being the parties thereto, thus clearing up the mystery as to the uses to which the plunder had been appropriated; that defendant deemed this a state of things demanding a remedy, and called upon the Secretary to take such steps as the justice of the case and the crying evil demanded, "meaning thereby that the plaintiff had conspired with and was an accomplice" of the prisoners in the embezzlement, and also that, as clerk and legal adviser of the borough justices, he had acted corruptly at the examination before them: *Held* by the Court of Queen's Bench, and by the Exchequer Chamber, affirming their judgment, that the letter was capable of the meaning ascribed to it by the innuendo.

Held also, by the Court of Exchequer Chamber, that a libel sufficiently appeared on the declaration, without the innuendo.

CASE. The declaration alleged that plaintiff, before and at the time of the committing, &c., carried on the business and profession of an attorney at law, and also the business, &c., of a solicitor of the Court of Chancery, at St. Alban's, in Hertfordshire, and was acquiring great gains, &c.: allegation of good character: and also plaintiff, before and at the time of the committing, &c., held and enjoyed the office of town clerk of the borough of St. Alban's, and also the office of clerk to the justices of the peace of the said borough, the jurisdiction of which said justices is distinct from and independent of and unconnected with the jurisdiction of the justices of the peace of the liberty of St. Alban's in the county of *Hertford: allegation of faithful discharge of the duties of the said offices, and of plaintiff's good repute with the justices of [*900 the borough: That, before and at the time of the committing, &c., to wit, 16th April, 1846, one Richard Charles Gutteridge, who before then had been in the employ of one Thomas Kinder, a brewer at St. Alban's, was apprehended upon certain charges of felony; that is to say, for that he, the said R. C. G., being clerk and servant to the said T. K., did, by virtue of such his employment, whilst he was such clerk, &c., receive and take into his possession divers moneys for and in the name and on the account of the said T. K., his master, and did fraudulently and feloniously embezzle the same: That R. C. G., on, &c., was brought before the justices of the peace of the said liberty to be examined by them, and was then and afterwards, to wit, 21st April, in the year aforesaid, examined by them concerning the said charges; at which said examinations plaintiff acted as, and was, at the request of the said R. C. G., the legal adviser and attorney at law of the said R. C. G.: And also that, before and at the time of the committing, &c., to wit, 18th April, 1846, a certain other person, viz. one David Hutson, who before then had been in the employ of the said T. K., was taken into custody and apprehended upon a certain other charge of felony, that is to say, for that he, the said D. H., being clerk and servant to the said T. K., did, by virtue of such his employment, whilst he was such clerk and servant, receive and take into his possession divers moneys for and in the name and on the account of the said T. K., his master, and did fraudulently and felo-

niously embezzle the same: and the said D. H., on the day and year last aforesaid, was brought before the justices of the said borough, to *901] *be examined by them, and was then, and afterwards, to wit, on, &c., examined by them concerning the said last mentioned charge; at which said examinations of the said D. H. plaintiff acted and was the legal adviser of the said justices. Yet defendant, well knowing, &c., but contriving, &c., to injure plaintiff in his said good name, &c., and to bring him into public scandal, &c., and to injure plaintiff in his said businesses and professions, and in his said offices of town clerk and clerk, &c., to the justices aforesaid, and to cause it to be suspected, &c., that plaintiff had acted improperly and dishonestly in his said professions and businesses, and in his said offices of town clerk and clerk and legal adviser to the justices of the borough, heretofore, to wit, on 23d April, 1846, in the form of a letter addressed To the Right Honourable Sir James Graham, Secretary of State, Home Office, meaning thereby the Right Honourable Sir James Robert George Graham, Baronet, one of the principal Secretaries of State of our Lady the now Queen, falsely and maliciously did compose and publish, and cause and procure to be published, of and concerning plaintiff, and of and concerning the said examinations of the said R. C. G. and D. H. respectively, and of and concerning the conduct of plaintiff in his said offices of town clerk and clerk and legal adviser as aforesaid, and in his said businesses and professions, and of and concerning the conduct of plaintiff at the said examinations, a certain false, &c., libel, containing, amongst other things, the false, &c., and libellous matter following, of and concerning plaintiff, and of and concerning the said examinations and the conduct of the plaintiff as aforesaid; (that is to say):

*902] "Honourable Sir (meaning" &c.), "Deeming the due *administration of justice of paramount importance, and that those who administer it should be not only pure but above suspicion, I (meaning" &c.) "beg to call your attention to the following facts, showing the anomalous position of a certain functionary (meaning the plaintiff) in this borough (meaning the said borough of St. Alban's). At this time there are two persons fully committed for trial for felony, one (meaning the said R. C. G.) by the liberty magistrates, and one (meaning the said D. H.) by the borough magistrates. The parties (meaning the said D. H. and R. C. G.) are related, being uncle and nephew, and lately clerks to a brewer (meaning the said Mr. T. K.), whom they are charged with having robbed for a series of years. The nephew (meaning the said R. C. G.) was taken into custody first; and he was committed by the liberty magistrates, and is now in our gaol, bail having been refused. This prisoner (meaning the said R. C. G.) is defended by the town clerk of this borough (meaning the plaintiff). The uncle (meaning the said D. H.) was committed by the borough magistrates, the town clerk (meaning the plaintiff) taking the evidence, and acting as legal adviser to the

magistrates; a friend of his acting as legal adviser to the prisoner. The most close intimacy has existed for years between the town clerk (meaning the plaintiff) and the two prisoners (meaning the said R. C. G. and D. H.): and, when the nephew's (meaning the said R. C. G.'s) papers were yesterday examined, an enormous amount of accommodation bill transactions, and legal proceedings arising therefrom, amounting to many thousands, were discovered; the said town clerk (meaning the plaintiff), and others with whom he (meaning the said plaintiff) is closely associated, being the parties *thereto, thus clearing up the mystery as to the uses to which the plunder had been appropriated. [*903 Deeming this a state of things demanding a remedy, I" (meaning, &c.) "respectfully call your prompt attention to the same, feeling assured that you will institute the necessary inquiry, and take such steps as the justice of the case and the crying evil pointed out demand (meaning thereby that the plaintiff had conspired with, and was an accomplice of, the said R. C. G. and D. H. in embezzling the moneys of the said T. K., and had made use of the proceeds of the said embezzlement, and also that the plaintiff, as such clerk and legal adviser as aforesaid, had acted corruptly and dishonestly in his said office and employment at the said examinations of the said D. H. before the said justices of the said borough, in order that the said justices might be induced to dismiss the said charge against the said D. H., and to discharge him out of custody). By means," &c. (General allegation of damage to character, &c.)

Pleas: 1. Not guilty. Issue thereon. 2, 3 and 4. Pleas in justification. Replication to each, De injuriâ. Issue thereon.

On the trial, before PARKE, B., at the Hertfordshire Summer assizes, 1846, the plaintiff proved that the defendant had written and sent the letter, mentioned in the declaration, to Sir James Graham, who was then Secretary of State for the Home Department, and who had thereupon instituted an inquiry under the superintendence of Mr. F. N. Rogers, the Deputy Judge Advocate, who had not yet reported the result. The plaintiff also gave evidence to show that the charges in the libel were, in part, false; and also that the defendant, who was an inhabitant of the borough of St. Albans, had said *that he should feel great pleasure in ridding the borough of men like the plaintiff. [*904 The counsel for the defendant contended that the letter was a privileged communication, and that express malice could not be proved by evidence of falsehood. The learned Judge gave leave to move for a nonsuit: and he left to the jury whether they believed the innuendo as to the meaning of the letter; and, if they did, whether the defendant had sent the letter merely with the honest purpose of aiding in the administration of justice, or from a malicious motive, and with a knowledge that the charge was false. No evidence was offered in support of the pleas in justification. Verdict for plaintiff on all the issues.

M. Chambers, in Michaelmas term, 1846,(*a*) moved for a nonsuit, or a new trial, or to arrest the judgment. The Secretary of State has the superintendence of the functionaries who take part in the administration of justice; and any person is entitled and bound to bring before him cases of maladministration in an office connected therewith, especially if such person be, as here, an inhabitant of the place in which the office is exercised. The communication itself may be said, from its very nature, to be confidential. The falsehood of the charge does not destroy the protection which the privilege confers; *Lake* v. *King*, 1 Saund. 131, 132, *Rex* v. *Baillie*, 21 How. St. Tr. 1, 71. Even if there be an exception to this rule, in the case of a malicious motive, there was in the present case no evidence of malice for the jury. The application to the Home Secretary was regularly made, with a view to an inquiry, *905] *which had accordingly been instituted. It is true that, in *Robinson* v. *May*, 2 Smith, 3, it was held that, where there was an "absence of all ground for the representation," that was proof of malice: but here only a part of the charge was shown to be false. Further, the publication itself is not such as to justify the innuendo, which attempts to extend the meaning. It was therefore not competent to the jury to affirm the innuendo; and the judgment must be arrested; *Solomon* v. *Lawson*, 8 Q. B. 823,(*b*) *Gutsole* v. *Mathers*, 1 M. & W. 495, S. C. Tyrwh. & Gr. 694. *Cur. adv. vult.*

Lord DENMAN, C. J., in the same term (November 16th), delivered the judgment of the Court.

We are of opinion that the defendant was not exempt from responsibility for that which would otherwise be a libel, by reason of its being an application to a competent tribunal for redress; because the Secretary of State has no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application. We are also of opinion that proof of falsehood in a part of the statement is evidence for the jury, to renew the presumption of malice where the occasion of the publication has been evidence to rebut it. We are also of opinion that the libel is capable of the meaning imputed by the innuendo: and, as the jury have found it to be true, and the Judge is not dissatisfied with the verdict, the rule is not granted.

Rule refused.

(*a*) November 2d. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and ERLE, Js.
(*b*) See *Le Fanu* v. *Malcomson*, 1 H. Lords' Ca. 637.

*In the Exchequer Chamber. [*906

(Error from the Queen's Bench.)

STURT *v.* BRAGG.

For syllabus, see p. 899, antè.

JUDGMENT having been entered for the plaintiff in the Queen's Bench, error was brought in the Exchequer Chamber.

Besides the common assignment of errors, it was specially assigned for error, that the innuendos in the declaration were bad in law, and improperly attempted to extend the meaning of the alleged defamatory matter beyond its natural and proper meaning and construction, and beyond the meaning which could by law be put thereupon; and that there were no proper or sufficient innuendos to explain the meaning of the alleged defamatory matter, and show that it was actionable, the said matter not being actionable without innuendos.

The case was argued in this vacation (June 15th).

Peacock, for the plaintiff in error. The letter does not amount to a charge that the plaintiff was an accomplice in the embezzlement: the innuendo, therefore, that he was such accomplice, is too large. Neither the allegation that he was intimate with the person accused of that offence, nor that he and his friends were parties to transactions connected with the accommodation bills, can justify the innuendo. It is not stated whether the plaintiff was the party giving or receiving accommodation by means of the bills. Circumstances of suspicion, at most, are indicated. If the plaintiff accommodated Gutteridge, and he committed felony to take up the bills, that would be no offence in the *plaintiff; it is not stated that he even knew how the proceeds [*907 of the felony were applied. The declaration with the innuendo would require a very different plea of justification from that which would suffice if the innuendo were not there. Whether the innuendo extends the meaning of the libel is for the Court to decide, and not for the jury. If a libel is not intelligible without extraneous matter, such matter must be set out in the inducement for the information of the Court. All that the jury have to find, as to the extraneous matter, is whether the libel was published with reference to it: when that is found, it is exclusively for the Court to decide whether the publication, so connected, is a libel.

Hawkins, contrà, was not heard.

WILDE, C. J. It is quite clear that the judgment must be affirmed. It is impossible to doubt that the object of the letter was to defame the plaintiff, and also that it would have that effect. (His Lordship then went through the various allegations in the letter, and commented on

their libellous character and on their injurious tendency as addressed to a Minister of State, under whose superintendence a prosecution against a public functionary in respect of such matters as were charged in the letter might be instituted.) The defendant now seeks to reason away all the meaning which out of court he intended his letter to convey. No man out of Court could read his letter without thinking that, if it were true, the plaintiff ought instantly to be removed from his office. Thus far without the innuendo. A question has been raised whether it was competent to the jury to find the truth of the innuendo; and it is said *908] that the matter should not have been left *to the jury. Undoubtedly it is the duty of the Judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo: but, when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it. I think this letter was capable of the meaning ascribed to it. With, or without, the innuendo, in either case, I think the plaintiff entitled to judgment; for the letter in itself discloses a cause of action, and is also such as to justify the finding the truth of the innuendo.

COLTMAN and CRESSWELL, Js., and PARKE, ALDERSON, ROLFE and PLATT, Bs., concurred. Judgment affirmed.(a)

(a) The case in the Exchequer Chamber is reported by H. Davison, Esq.

In the Exchequer Chamber.

(Error from the Queen's Bench.)

PAYNTER, Esq., *v.* The QUEEN. *June 23d.*

Under stat. 1 W. 4, c. 21, s. 4, after a magistrate has made a return to a mandamus requiring him to issue a distress warrant, and the prosecutor has demurred, the Court of Queen's Bench will give leave to the party interested, who has had notice under the rule nisi for the mandamus, and has shown cause, to amend the magistrate's return, and conduct the defence, the magistrate not opposing the application for such leave.(a)

Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, That

Any one of several joint occupiers is liable for the whole amount of their joint assessment to a poor rate; and a warrant of distress against any one alone is good:

A poor rate is not invalid because the declaration at its foot is not in the very words of the form given by the schedule to stat. 6 & 7 W. 4, c. 96:

Notice of publication of a poor rate need not state that the rate has been allowed.

A MANDAMUS issued,(b) directed to "Thomas Paynter, Esq., one of the magistrates of the Police Courts of the metropolis, sitting at the *909] Police Court at *Wandsworth, in the parish of Wandsworth, in the county of Surrey." The inducement to the writ stated that,

(a) See *Regina* v. *Cheek*, 9 Q. B. 942.

(b) The rule for the mandamus was made absolute in Easter term, 1845; *Regina* v. *Paynter*, 7 Q. B. 255.

by a rate or assessment made for the relief of the poor of the parish of Saint Mary, Putney, in Surrey, within the district of the Police Court aforesaid, intituled "An assessment," &c., made 3d October, 1844, after the rate of 1*s.* in the pound, and duly allowed and published, one Henry Chasemore was, on 8d October, 1844, "duly assessed and rated as the occupier, jointly with divers other persons, of that part of a certain bridge, leading from the parish of Putney in the county of Surrey to the parish of Fulham in the county of Middlesex, as is situate within the parish of Putney, and the land upon which the said part of the said bridge is erected and built, together with the toll house and other buildings, at the sum of 48*l.* 10*s.*, being at the rate of 1*s.* in the pound upon 970*l.*, the said sum of 970*l.* being the alleged annual rateable value of the said toll house and other buildings of the said part of the said bridge," &c. The inducement then averred demand of the rate from Chasemore, and nonpayment: and "that the said H. C., having been duly summoned before George Clive, Esquire, or such other magistrate of the Police Courts, &c., as should be sitting at the Police Court at Wandsworth aforesaid, to show cause why he did not pay," &c., "personally appeared before you, the said Thomas Paynter, on Thursday the 23d day of January now last past, at the police court in Wandsworth," &c., "in obedience to the summons in that behalf, but did not show any sufficient cause why he had not paid the same; and an application was thereupon then and there made to you, the said T. P., as one of the magistrates of the police courts," &c., "by and on behalf of the *said churchwardens," &c., "of St. Mary, Putney, within the metropolitan police district aforesaid, to issue your warrant of distress to levy the said sum of 48*l.* 10*s.*, so assessed," &c., "upon the goods and chattels of the said H. C. Yet you the said Thomas Paynter, so being one of the magistrates of the police courts," &c., "not regarding," &c.: the inducement then averred neglect and refusal to issue the warrant, whereupon the churchwardens and overseers besought a remedy: and the writ commanded that "you, the said Thomas Paynter, as such magistrate of the police courts," &c., immediately after the receipt of the writ, do "issue your warrant of distress," &c., "for the levying of the said sum of 48*l.* 10*s.* upon the goods and chattels of the said H. Chasemore, in pursuance of the statute," &c., "or show cause," &c. Tested 6th May, 8th Victoria. [*910

To this writ Mr. Paynter made a return, which was filed 28d May, 1845. The churchwardens and overseers demurred generally to the return, and ruled Mr. Paynter to join in demurrer.

C. Clark afterwards, in Trinity term, 1845, obtained a rule on behalf of Chasemore, calling on the prosecutors and Mr. Paynter "to show cause why Henry Chasemore, in the said writ mentioned, should not have leave to make a further return to the said writ, or amend the said return made by the said Thomas Paynter, and be at liberty to support such farther return or amended return, when made;" upon notice to

the attorney or agent of the prosecutors, and also to the attorney or agent of Mr. Paynter. The rule was drawn up on reading the affidavit of Chasemore's attorney, and writings thereto annexed, and the writ and return.

*911] *The affidavit referred to the rule nisi for the mandamus, which called on Mr. Paynter to show cause, on notice to be given to him and to Chasemore. The affidavit then stated that both Paynter and Chasemore had shown cause; and it detailed the proceedings down to the return: and the deponent added that he was advised by counsel, on behalf of Chasemore, that the return did "not raise all the points of law necessary to be brought under the notice" of the Court, "in order to have the subject matter of the said rule, mandamus and return duly and fully argued and discussed on the merits, as the same respectively affect the said H. Chasemore; but that, to do so, it is requisite that a return to such mandamus should, with the leave of this honourable Court, be made by the said H. Chasemore:" and that the deponent was advised and believed "that, unless the said H. Chasemore is allowed to make a return to the said writ of mandamus, or to amend the return already made, the merits, as affecting him, cannot be fully presented for the consideration and decision" of the Court. The affidavit then stated that the prosecutors had demurred, and had served Mr. Paynter with a rule to join. In Trinity term (June 12th), 1845,

Crompton and *Pashley* showed cause. The application, if proper under any circumstances, should have been made before the return. Stat. 1 W. 4, c. 21, s. 4, authorises the Court, on application for any writ of mandamus (except under stat. 9 Ann. c. 20), "to make rules and orders, calling, not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause

*912] *against the issuing of such writ and payment of costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given or mentioned by or in any act passed or to be passed during this present session of parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: provided always, that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, shall be made and joined by and in the name of the person to whom such writ shall be directed; but nevertheless the same shall and may, if the Court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings, at his own expense; and in such case, if any judgment shall be given for or against the party suing such

writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had." No case has occurred under this act: but, if the analogy of the Interpleader Act, 1 & 2 W. 4, c. 58 (which, by sect. 8, is to be acted upon as if referred to in stat. 1 W. 4, c. 21, s. 4), be followed, according to which applications like this must be made "after declaration, and before plea" (sect. 1), *this application cannot be made after the return, still less after a demurrer to it. [*913 The power is entire: the new party is to frame the return and conduct the subsequent proceedings: the whole defence, or no part of it, should be left to him. The return here is already framed. [PATTESON, J. When is the proposed new party to apply?] On cause being shown: he had notice, here, by the rule nisi for the mandamus. If the magistrate had obeyed the writ in the first instance, and had so returned, the new party could not have afterwards come in: and what difference can there be between different returns made by the magistrate? [Lord DENMAN, C. J. What can you lose? The applicant must pay the costs.] The prosecutors may prefer looking to the magistrate for costs. Besides, nothing appears as to the nature of the proposed amendment: this rule leaves it open to the applicant to place on the record any return, however absurd.

M. Chambers and *C. Clark*, contrà, were stopped by the Court.

Lord DENMAN, C. J. If I thought any undue advantage had been gained by the delay, I should pause before acceding to this application. But I cannot see any injury which can accrue to the prosecutors. We should of course look narrowly at such applications.

PATTESON, WILLIAMS and COLERIDGE, Js., concurred.

The rule was drawn up in the following terms.

"Upon hearing Mr. *Crompton*, of counsel for the prosecutors, and Mr. *Chambers*, of counsel for Henry Chasemore in the writ of mandamus *issued in this prosecution mentioned, and upon reading the affidavit," &c., "and a rule of this Court," &c., "and no [*914 cause being shown to the contrary on behalf of Thomas Paynter, Esquire, the defendant: It is ordered that the said H. Chasemore be at liberty to amend the return made to the said writ by the said T. P., so as that the same be amended within ten days next following; and that the said amended return shall be expressed to be made on behalf of the said H. C.; and that the said H. C. be at liberty to support such amended return, and conduct the subsequent proceedings thereon at his own expense; the said H. C. hereby undertaking to pay to the prosecutors, or to their attorney, the costs of the demurrer filed to the said return made by the said T. P., and also the costs of this application: such costs, if necessary, to be taxed by the coroner and attorney of this Court. And it is further ordered that, if the prosecutors shall plead to issue to the said amended return, the said H. C. shall accept short notice of trial for the next assizes to be holden in and for the county of Surrey; and that, if judgment shall be given for the prosecutors on such amended return, the said H. C. shall be liable to costs in the place of the said Thomas Paynter."

Thereupon (as hereafter set forth) the return was amended; and the prosecutors demurred to it specially. Joinder in demurrer.

The case being called on for argument in the Court of Queen's Bench, the counsel for the prosecutors appeared in support of the demurrer; but no one appeared for Mr. Paynter or H. Chasemore. Judgment was thereupon given for the Crown.

The record was made up as follows.

"*Surrey.* Amongst the records of this year. No. 29, R. 3. Some time ago, that is to say on," &c., "our Lady the Queen sent to Thomas Paynter, Esq., one of the magistrates," &c. The mandamus was then set out, as antè (pp. 908—910), concluding:

"By the Court. Robinson. By rule of Court.

"And, before the time of the issuing of the said writ, that is to say on the 31st day of January, in the eighth year of the reign of our Lady, &c., "the said Court of our Lady the Queen then here at Westminster,

*915] *called, by a rule of the same Court, upon one Henry Chasemore, a person claiming interest in the matter of the said writ, to show cause against the issuing of the said writ, and payment of the costs of the application: and the said H. C., before such issuing of the said writ, to wit, on," &c., "appeared before the said Court in compliance with such rule: and thereupon the said Court did order and direct that the return to be made to the said writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, should be made and joined by and in the name of the said Thomas Paynter, Esq., the person to whom such writ was directed as aforesaid, but that the same should be expressed to be made and joined on behalf of the said Henry Chasemore; and that the said H. C. should be permitted to frame the return, and to conduct the subsequent proceedings at his own expense: and that, if judgment should be given for the prosecutors on such return, the said H. C. should be liable to costs in the place of the said Thomas Paynter. And, on the 22d day of May in the said eighth year," &c., before our said Lady the Queen at Westminster, the said Thomas Paynter, Esq., in his own name, but on behalf of the said Henry Chasemore, returned the said writ as follows, that is to say:(*a*)

"I, Thomas Paynter, Esq., one of," &c., "certify," &c., "that there is not, at the foot of the rate or assessment, within mentioned to have been made for the relief of the poor of the parish of St. Mary, Putney," &c., "a declaration signed by a majority of the churchwardens and

*916] overseers of the said parish in such form *as is required by the act of parliament in that case," &c.; "but, in place thereof, a declaration so signed in the words following: that is to say: 'We, G. W. B. and J. S., overseers, and J. W. and A. F. B., churchwardens, do declare the several particulars specified in the several columns of the foregoing rate to be true and correct, as far as we have been able to ascertain them, to which end we have used our best endeavours:' wherein

(*a*) The return, as amended, contained the whole of Mr. Paynter's return (referred to, antè, p. 914), with additions which are pointed out in the notes.

the word 'several,' when that word secondly occurs, and the word 'foregoing,' are respectively substituted for the words 'respective' and 'above' in the form given in that behalf in the said act, and without a declaration in which form any rate, as thereby provided, is of no force or validity. And I," &c., do further certify, &c., "that the notice of publication of the said rate or assessment within mentioned was in the words following, that is to say:

'Parish of St. Mary, Putney,
'3d November, 1844.

'Notice is hereby given that a rate of assessment at 1s. in the pound has been made for the necessary relief of the poor of this parish, the payment of the police and county rates, and for the other purposes named in the several acts of parliament relating thereto. The same has been allowed by one of Her Majesty's justices of the peace acting(a) and within the metropolitan district, pursuant to the statute in that case made and provided.' Which notice was signed by the churchwardens and overseers of the said parish of St. M., P.; and the rate or assessment was not otherwise duly published, as in the within writ is suggested.(b) And I," &c., further *certify, &c., "that the notice of publication of the said rate does, on the face of it, purport that the said rate was allowed by one of Her Majesty's justices of the peace acting and within the metropolitan district, pursuant to the statute in that case," &c.; but it does not purport or allege that the said rate had been so allowed by the said justice of the peace at any of the metropolitan police courts held within the limits of the metropolitan police district, according to the form of the statute in such case," &c. "And I," &c., further certify, &c., "that Henry Chasemore, within mentioned, is, in and by the said rate or assessment, expressed to be jointly rated and assessed together with ninety other persons therein severally named, in the said sum of 48*l.* 10*s.*; and that that sum, so far as the same is duly rated and assessed, is due and owing from and by the said H. C. jointly with the said ninety other persons; and that the summons within mentioned was directed to the said H. C. jointly with the same ninety other persons, all in the said summons respectively named; and that the warrant of distress for the levying of the said sum of 48*l.* 10*s.*, if any such warrant were issued, ought to be issued for levying the same sum upon the goods and chattels of the said H. C. and of the said ninety other persons in the said rate or assessment and in the said summons respectively named, jointly, and not upon the goods and chattels of the said H. C. only.(c) And I," &c., further certify, &c., "that the said H. C. and the said ninety other," &c., "are rated, in and by the said rate, in respect of

[*917

(a) See 7 Q. B. 264, and note (e) ibid.

(b) The words of the return from henceforward down to "case," in p. 917, line 10, were added on the amendment.

(c) The words from henceforward, down to the word "bridge," in p. 918, line 16, were added on the amendment.

property consisting of shares in the tolls of, and arising from, a certain
*918] bridge called *Fulham and Putney Bridge; which said shares were created by and under the provisions of a certain indenture, dated the 11th day of November, 1729, which said indenture was made in pursuance of the enactments of two several acts," &c. (12 G. 1, C. 36, and 1 G. 2, Stat. 2, c. 18); "and that, by force of the provisions of the said deed so made as aforesaid, the shares of the shareholders of the said bridge are held by them as tenants in common, and not as joint tenants; and that, as such tenants in common, they are entitled to divide the tolls of the said bridge after payment of all the charges created by the said deed and the said acts, and are made liable to the said charges, should such tolls be found insufficient to meet them, rateably and proportionably according to their several rights, shares and interests in the said bridge. And therefore I, the said Thomas Paynter, ought not to issue my warrant," &c.

"And hereupon, on," &c. (28th May, 8 Victoria), "the said churchwardens and overseers of," &c., "by," &c., "their attorney, say that the said return is not sufficient in law," &c. Special demurrer, assigning for causes that, although the return alleges that H. Chasemore and the ninety other persons are rated in respect of property consisting of shares in the tolls of, and arising from, a bridge, &c., it omits to show such property to be the part of the bridge in the writ mentioned and the land upon which the bridge is erected, also in the writ mentioned, and situate in the parish of Putney. And it also omits to show such property to be the same as, or any part of, the toll house and other build-
*919] ings in the writ and in the rate mentioned. And *that the return merely shows H. Chasemore and ninety other persons in the rate named to be rated in and by the rate in respect of property consisting of shares in certain tolls in the return mentioned; but the return does not deny any suggestion of the writ in respect of the said H. C. having been duly rated as the occupier, jointly with divers other persons, of part of the bridge in the parish, and of the land upon which the said part of the bridge is erected, in manner set forth in the writ. And also that the return is vague and ambiguous, &c. And that the return is insufficient in stating mere conclusions of law, as to the effect and operation of the indenture and of the several acts of parliament therein mentioned. And that it is in other respects uncertain, &c.

"And the said Thomas Paynter, Esq., on the behalf of the said Henry Chasemore, by John Blachford the attorney of each of them the said Thomas Paynter and Henry Chasemore, says that the said return is sufficient in law.

"And, because the Court," &c.: here followed continuances, by curia advisari vult, giving days "as well to the said churchwardens and overseers of," &c., "as to the said Thomas Paynter, Esq., and Henry Chasemore," and reciting the appearance of all the said parties on the several

days given, "by their respective attorneys aforesaid;" the last day given being 8th May, 9 Victoria. Then followed the judgment of the Court: "that the said writ of mandamus is valid in law, but that the said return thereto is not valid in law; and that a peremptory writ of mandamus do issue in this behalf: and that the said churchwardens and overseers of the poor of," &c., "do recover against the said Henry *Chasemore the sum of 65*l.* 8*s.* for their costs by them sustained," &c., "about their suit in this behalf, according to the form of the statute," &c. [*920

Error was brought on this judgment in the Court of Exchequer Chamber. Besides the common assignment of errors, it was specially assigned for error that the return was good, in this, that the declaration at the foot of the rate was not in the statutory form; that the notice of publication of the rate did not purport that the rate had been allowed by a metropolitan police magistrate at any one of the metropolitan courts held within the metropolitan police district; that Chasemore was jointly rated with ninety other persons at a sum which was due from him jointly with them, and that the warrant of distress for that sum ought not to issue on his goods alone; that Chasemore and the said other persons were rated in respect of shares in the tolls, and that such shares were held by the shareholders as tenants in common and not as joint tenants. Joinder in error.

C. Clark, for the plaintiff in error, admitted that, unless the Court should overrule *Regina* v. *Fordham*, 11 A. & E. 73, the rate was valid, although the declaration signed by the parish officers was not in the precise words of the form given in the schedule to stat. 6 & 7 W. 4, c. 96. On the second point (that the notice of publication did not purport that the rate had been allowed at the Metropolitan Police Court in pursuance of the new statutory jurisdiction given to a single police magistrate), he referred to the provisions of the Metropolitan Police acts, 2 & 3 Vict. c. 71, ss. 13, 14, 3 & 4 Vict. c. 84, *s. 6; to Dwarris on Statutes, 2d ed. c. 7, 477, *Helier* v. *Hundred de Benhurst*, Cro. Car. 211, *Foster's Case*, 11 Rep. 56 *b*, 63 *b*, *Christie* v. *Unwin*, 11 A. & E. 373, *Regina* v. *Griffin*, 9 Q. B. 155. [ALDERSON, B. The notice of publication, as set out in the return, states that the rate was allowed "pursuant to the statute." PARKE, B. The writ alleges that it was "duly allowed;" and the allegation is not traversed. There is nothing in the objection.] Thirdly he contended, on the ground stated in the return and assignment of errors, that the warrant could not issue against the goods of Chasemore alone. [*921

Crompton, contrà. As to the second point, the return does not show substantively how the rate was allowed. The notice of publication, indeed, refers to the allowance; but it was quite unnecessary that it should do so; *Bennett* v. *Edwards*, 7 B. & C. 586. No objection, therefore, to the allowance itself is open on the record. As to the third

point. Each of the joint occupiers rated is liable for the whole assessment. The warrant could not go against all, unless there had been a demand and summons upon all, which might be impracticable. Stat. 43 Eliz. c. 2, s. 4, authorises a distress against "the offender's" goods; and a person assessed to a poor rate is not an offender, within the statute, until after demand and summons.

C. Clark replied.

WILDE, C. J. There is no difficulty whatever in the case. As to the *922] second point, no question of *jurisdiction is raised; for the manner of allowing the rate is not shown by the record. The return merely sets out the notice of publication, which refers to the allowance. The objection, therefore, is directed to the notice of publication; and it appears from *Bennett* v. *Edwards*, 7 B. & C. 586, that the notice need not refer at all to the allowance.

With regard to the objection that the warrant cannot lawfully issue against Chasemore alone, there is nothing in the return to controvert the joint occupation alleged in the writ; and it might be impracticable to issue the warrant against all, for it can issue against offenders only; and offenders, under the statute, are persons who do not pay after demand and summons. Each is liable for the whole rate; and each person, after demand and summons, but not before, may be distrained upon. The judgment of the Court of Queen's Bench must be affirmed.

MAULE and CRESSWELL, Js., and PARKE, ROLFE, and PLATT, Bs., concurred.(*a*) Judgment affirmed.(*b*)

Judgment having been given in the Exchequer Chamber, the record in the Queen's Bench, from the judgment there, antè, p. 920, was completed as follows.

"Afterwards, to wit, on the 21st day of May, in the 9th year," &c., *923] "our said Lady the Queen sent to her *trusty and well beloved Thomas, Lord DENMAN," &c., "her writ closed in these words, to wit: Victoria," &c., "to our right trusty," &c., "greeting. Forasmuch as in the record and proceedings, and also in the giving of judgment on a certain demurrer to a return to our writ of mandamus, granted by us at the instance of the churchwardens and overseers of," &c., "according to the form," &c., "against Thomas Paynter, Esquire, one of," &c., "commanding him," &c., "manifest error hath intervened, to the great damage of the said Thomas Paynter, as by his complaint we are informed: and whereas by a statute," &c. (11 G. 4 & 1 W. 4, c. 70.) The record then followed the usual form, down to the bringing of the transcript into the Exchequer Chamber. "And thereupon came into the said Court of Exchequer Chamber, as well the said Thomas Paynter by John Blachford his attorney as the churchwardens and overseers of," &c.,

(*a*) COLTMAN, J., and ALDERSON, B., were present during part of the argument.

(*b*) The report of the argument and judgment in the Exchequer Chamber is by Henry Davison, Esq.

"by Evan Morris their attorney: and the said Thomas Paynter thereupon said," &c.; assignment of error, and prayer of reversal, by Mr. Paynter only; and joinder by the churchwardens and overseers, with affirmance by the Court of Exchequer Chamber in the usual form. "And it was further considered that the said churchwardens and overseers of," &c., "should recover against the said Henry Chasemore the sum of," &c., "by the said Court of Exchequer Chamber of our said Lady the Queen adjudged to the said churchwardens and overseers of," &c., "and with their assent, according to the form of the statute in such case made and provided, for their costs which they had sustained and expended by reason of the prosecution of the said writ of error."

* On February 17th, 1845, another poor rate was made for St. Mary, Putney, in which Chasemore and eighty-nine other persons (whose names were set forth in one column of the rate under the head of "occupiers" and in a second under that of "owners") were assessed in 48*l.* 10*s.* for the bridge, land, toll-house and other buildings, described as in the preceding rate. Chasemore appealed, on the ground, among others, that "the said appellant is, in and by the said rate or assessment, rated or assessed jointly with several other persons, in the said rate or assessment named, as owner or occupier, and for or in respect of an alleged joint ownership and occupancy, with them, of property in such rate described as that part of Putney and Fulham Bridge situate within the parish of Putney, and the land upon which the same is erected and built, together with the toll-house and other buildings: whereas the said appellant is not, nor ever was, an owner or occupier jointly with the said several other persons, or with any one or more of them," "of the property so rated and described," &c. The Sessions confirmed the rate, subject to a case, in which the history and incidents of the property, and the facts as to Chasemore's connection with it, appeared, substantially, as in *Regina* v. *Paynter*, 7 Q. B. 255: and it was stated that the residue of the tolls, after payment of salaries and expenses, had regularly been divided among the shareholders. It was added that: "Until 1844, since which time no poor's rate has been paid for the bridge, the shareholders were assessed together in one aggregate sum, which was regularly paid for them by the appellant" (their clerk); "and none of the shareholders have ever been separately assessed in respect of their own separate share or shares. Many of the persons rated besides the appellant were shareholders at the time of the making the rate in question, and during the period for which it was made: and, though it did not appear at the trial of the appeal that all the persons so rated were such, none of the persons rated have appealed against the said rate except the aforesaid appellant. The Court of Quarter Sessions adjudged *that the said appellant, and the other persons rated who were shareholders at the time of the making of the said rate, were occupiers* of the property specified in the said rate; and they confirmed the said rate, subject to the opinion of this Court on the question: Whether the appellant *was improperly rated together with other shareholders* in one aggregate sum." If the Court should be of opinion that he ought not to be so rated, the order of Sessions was to be quashed and the rate amended by the appellant's name being struck out: otherwise the order to be confirmed. The case came on for argument in Trinity term (June 7th), 1848, when [*924

C. Clark, for the appellant, after referring to the decision in the Exchequer Chamber, above reported, said that he now relied only upon a point of form; namely that the sessions ought, in their adjudication, to have pointed out the persons who were shareholders when the rate was made, and with whom, consequently, the appellant was found to be joint occupier, and not to have left this uncertain: it being clear, upon the statement, that some of the persons rated were not shareholders at the time of rating: and he contended that the case ought to go back and be restated, or that the order should be confirmed without costs. [*925

Wallinger, contrà, pointed out that the case did not find as a fact that any of the persons rated were not shareholders at the time of rating: and he observed that the question submitted was only whether the appellant was improperly rated "with other," not *the other*, shareholders.

Per Curiam (Lord DENMAN, C. J., PATTESON and ERLE, Js.). It appears, by the case, merely that as to some of the parties there was no evidence. But they were not appellants. And whether they were shareholders or not was immaterial to the question proposed in the case. The appellant, therefore, has not made out any valid objection.

The order of Sessions was confirmed.

The QUEEN v. HUNT and Others.

Before stat. 9 & 10 Vict. c. 24, (s. 3), an indictment alleging the offence to have been committed at the parish of M., in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, was found at the Central Criminal Court, and removed by certiorari to the Court of Queen's Bench.

Held, that the case was properly tried by a Middlesex jury.

THIS was an indictment found at the Central Criminal Court in October, 1845, removed into this Court by certiorari, and tried by a Middlesex jury at the sittings after Hilary term, 1846. The indictment had the marginal venue "Central Criminal Court," and alleged the offence to have been committed at the parish of St. Marylebone, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court. Some of the defendants having been found Guilty,

Shee, Serjt. and *Peacock*, in Hilary term last, on behalf of different defendants, obtained a rule nisi to arrest the judgment, on the ground that a Middlesex jury had no jurisdiction to try an indictment found at the Central Criminal Court.

*926] *Prentice*, on a former day in this vacation,(*a*) showed cause, and *Peacock* was heard in support of the rule. The argument is sufficiently noticed in the judgment of the Court. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (July 7th), delivered judgment.

The objection in this case is that of mis-trial, a jury from the county of Middlesex having been summoned and having tried defendants in this Court, when the bill of indictment was found by a grand jury of that combined jurisdiction which was created by the Central Criminal Court Act, drawn from Middlesex and several other counties. It was said that the petty jury ought, until the passing of the recent act, 9 & 10 Vict. c. 24, to have been taken from the same mixed fund, and no other. The consequence would be, that a party against whom an indictment found in the Central Court was removed into this Court, before the recent act passed, could not be tried at all, because the power of summoning such mixed jury is confined to the Central Criminal Court, and could not be exercised by this.

The nature of the proceeding furnishes the answer to this objection. An indictment found at that Court sets forth an offence committed within its jurisdiction: and the act requires no other venue to enable it to try the defendant. But it may also, and it does in this case, contain a complete indictment at common law in the county where the offence is alleged to have been committed. It is a bill found by a competent

*927] authority, well *removed: and, when here, the Court sees a legal charge of misdemeanour committed in Middlesex, and has no occasion to look at that statement which shows that it was triable in the Central Court. In this state of things we are empowered, and even bound, to direct a trial in the regular manner, by requiring the sheriff

(*a*) July 2d. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

of that county to summon a jury for that purpose. The case is anomalous, because in the ordinary course of things the petty jury is drawn from the very same source as the grand jury: but that is no reason why there should be a failure of justice; and no principle of law seems to oppose the proceeding. The case of *Regina* v. *Stowell*, 5 Q. B. 44, assumes its legality; and that of *Regina* v. *Albert*, 5 Q. B. 37, is a direct precedent for it.

The minor objection, that the venue was left uncertain by the manner of introducing "the county aforesaid," was disposed of during the argument.(*a*) We then expressed our clear opinion that the reference was to the county of Middlesex. Rule discharged.(*b*)

(*a*) The objection was to the 2d count of the indictment. The 1st count charged a conspiracy to defraud the prosecutor of his money, by bringing an unfounded action on promises against him, which came on to be tried at the assizes for "the county of Surrey." The 2d count charged another conspiracy "at the parish aforesaid in the county aforesaid;" and the objection was that, as the county last named was Surrey, it appeared that the Middlesex jury could have had no jurisdiction to try the indictment. The Court pointed out that the only "parish aforesaid" was alleged to be in the county of Middlesex.

(*b*) Reported by H. Davison, Esq.

*KEEN *v.* The QUEEN. *July* 2. [*928

A Court of Quarter Sessions has power to respite a judgment from one session to another, without adjourning the session.

A record of quarter sessions, after stating a conviction on indictment for an assault, at an Epiphany Session, and that it was "*considered and adjudged* by the Court" that defendant should enter into recognisances to appear and receive judgment at the next Quarter Session, and to keep the peace for twelve months, and that such recognisances had been entered into, proceeded to state that judgment was respited upon the indictment until the next Easter Quarter Session, "because the Court here is not advised what judgment to give;" that, at the Easter Quarter Session, judgment was, for the same reason, again respited to the Midsummer Quarter Session; at which last mentioned session judgment was given that defendant should be fined, imprisoned, and enter into recognisances.

Held, that the order at the Epiphany Sessions, that defendant should enter into recognisances, was not a judgment upon the indictment, and did not make the judgment at the Midsummer session erroneous.

ERROR from the Quarter Sessions for Essex.

The record stated that, at the General Quarter Sessions of the peace, &c., holden at Chelmsford, in and for the county of Essex, on Tuesday the 6th January, 1846, before, &c., and thence continued, by several adjournments, &c., to Tuesday the 17th February, 1846, and then and there holden by adjournment, before, &c., by the oath of (setting out the names of jurors), it was presented in manner and form following: that is to say, &c. The record then set out three bills of indictment against the plaintiff in error for assaults upon Sophia, his wife; and, after stating that the plaintiff was arraigned upon them at the same adjourned sessions, and that he then and there pleaded Guilty, proceeded thus: "Whereupon, all and singular the premises being seen and fully understood by the Court here, it is *considered and adjudged* by the Court here that the said" plaintiff "do enter into recognisances" (setting

out the recognisances), "upon condition that, if the said" plaintiff "shall personally appear, and receive the judgment of the Court at the next
*929] General Quarter Sessions of the Peace, to be holden in *and for the said county, if called upon, and shall keep the peace towards the Queen, and all her liege subjects, and especially towards the said Sophia Keen his wife, for the space of twelve calendar months," &c., the recognisances were to be void. The record then stated that the required recognisances were entered into, and proceeded: "and, because the Court here is not advised what judgment to give of, and upon, the said several premises in the said indictments respectively mentioned, judgment is respited thereon until the next General Quarter Sessions of the Peace," &c. The record then stated that at the Easter Quarter Sessions of the same year, the justices not being yet advised what judgment to give, "judgment is further respited until the next General Quarter Sessions," &c. That at the said next General Quarter Sessions, holden on the 30th June, 1846, came the plaintiff "in his own proper person: and, the Court here being now advised, and all and singular the premises in the said indictments respectively mentioned being seen, and by the Court here fully understood, it is considered and adjudged by the Court here," &c.: then followed judgment that the plaintiff should be fined and imprisoned, and also enter into recognisances to keep the peace for a certain time after the expiration of his imprisonment.

It was assigned for error, that the Court had pronounced two separate and distinct judgments, and that the last judgment at the Midsummer Sessions was given without jurisdiction: and, also, that a Court of Quarter Sessions has no authority to respite a judgment from one session to another; and that the said last mentioned judgment was, therefore, on that ground also, given without jurisdiction.

*930] **Peacock*, for the plaintiff in error.(*a*) The Court of Quarter Sessions gave its judgment at the adjourned Sessions in February; whereby it was "considered and adjudged" that Keen should enter into recognisances: the justices, therefore, were functi officio, and had no jurisdiction to give any further judgment at a subsequent session; *Rex* v. *Bourne*, 7 A. & E. 58. The words "considered and adjudged" are essential characteristics of a record of judgment; 4 Inst. p. 70, *Rex* v. *Kenworthy*, 1 B. & C. 711. Independently of form, the nature of the proceeding shows that it was on giving judgment that the recognisances were required; for the sessions have no jurisdiction to require them at all, except on articles exhibited, or on judgment after indictment: here no articles have been exhibited; nor could they be so, the offence being that a breach of the peace *has been* committed. [PATTESON, J. The record proceeds, "and, because the Court here is not advised what judgment to give of, and upon, the said several premises in the said indictments." It is clear, therefore, that the Court did not suppose that

(*a*) The argument commenced on Wednesday, 30th June.

judgment had already been given.] The Court had jurisdiction to require these recognisances in no other way than as part of their judgment. If Keen had been imprisoned for refusing to enter into the recognisances, the record would have been an answer to an action for false imprisonment, because a competent court had given judgment that such recognisances should be required. [PATTESON, J. He entered into recognisances as the price of having judgment respited. Lord DENMAN, C. J. It is a conditional order: "Unless you enter into recognisances, judgment will be passed upon *you." ERLE, J. What is expressed, is an arrangement, and nothing more. COLERIDGE, J. Recognisances are always entered into voluntarily: the party of whom they are required declares himself "content." If he had not been content in this case, judgment would have been given against him at once.] [*931

Secondly. Even if the Court could respite judgment, it could only respite to a subsequent sitting of the same session by adjournment, and not to a distinct Quarter Session; Dickinson's Quarter Sessions, 61, 900, 5th ed., and the authorities there cited. [COLERIDGE, J. The sessions have statutory power to respite the trial of appeals in some cases. Could not they put off a trial on account of the absence of a witness until a subsequent session? Judgments are often respited until the next assizes.] The Judges have this power expressly given them by stat. 1 Ed. 6, c. 7; 2 Hale, P. C. 27: but the sessions have no such power.

Marsh, contrà. The argument for the plaintiff in error depends entirely upon the passages cited from Dickinson's Quarter Sessions: but they are not supported by the authorities. Those authorities prove no more than that one session cannot be adjourned beyond the next, that the caption of an indictment must contain a proper statement of all adjournments made during its pendency, and that a subsequent session cannot deal with a matter which has been completely disposed of by a prior session. Thus, in *Rex* v. *Grince*, 19 Vin. Abr. 358, tit. *Sessions of the Peace* (W), pl. 7, the judgment of the sessions was reversed because the defendant had judgment given against him by *adjournment of the Epiphany sessions to a day subsequent to the Easter sessions. In *Lingfield* v. *Battle*, 2 Salk. 605, the "Caption of an indictment of sessions, was, *Sessio tent. vicesimo et vicesimo octavo die Julii, &c. Et per* HOLT, C. J. It is naught, for though a sessions may adjourn from one day to another, and so sit by adjournment, yet it must not appear in a lump, as sitting three days together, but distinctly." In *Cockfield* v. *Boxstead*, 2 Salk. 477, and in *Pridgeon's Case*, Cro. Car. 341, 350, it was held to be a fatal objection, that the final decision of one session had been reversed at another and a distinct session. In *Thurstan* v. *Slatford*, 1 Lutw. 905 *b*, the question was, not whether the adjournment was legal, but whether it sufficiently appeared on the record. [Lord DENMAN, C. J. The commission of the peace in terms [*932

authorises the justices to "continue processes" against persons indicted.] The right of continuing process is an incident to all courts; Com. Dig. *Courts* (P 4), (P 11). [COLERIDGE, J. We constantly direct the sessions to enter continuances from one session to another, in order that the legality of anything we require them to do with respect to a matter entered upon at a prior session may appear upon the face of their proceedings.] In *Rex* v. *Bourne*, 7 A. & E. 58, it seems to be assumed that a subseqnent session might have given the proper judgment, if judgment had not already been given. In *Rex* v. *Fowler*, 4 B. & Ald. 273, the judgment of sessions was held right, although it appeared on the record that a verdict given at one session had been set aside, and a venire de novo awarded to the next session, and that the judgment in question had been given on the second verdict.

*933] *Peacock* in reply. In *Rex* v. *Fowler*, 4 B. & Ald. 273, there was a mis-trial, and the first verdict was a nullity: here the question is whether one session can determine a case duly heard at a prior session.

Lord DENMAN, C. J. It appears to me that the whole argument for the plaintiff in error is founded on a fallacy. It is assumed that a subsequent session is a different Court from a former session. But it is clearly the same Court. The whole body of justices constitute the Court. Such a Court, according to the passages cited from Comyns's Digest, possesses, as incident to its jurisdiction, the power of adjournment: and surely no better reason can be given for an adjournment than that the justices have not made up their minds as to the judgment to be given. The whole effect of what was done at the former session was that the plaintiff entered into recognisances in preference to undergoing the judgment of the Court at once.

PATTESON, J. The passage in Dickinson is certainly not supported by the authorities. Stat. 1 Ed. 6, c. 7, s. 5, which gives power to judges under a new commission to pass judgment against a person found guilty at a former assize, might have been necessary, because the subsequent assize is held under a new commission. But the sessions have only one commission; so it is quite correct for the justices to adjourn a case from one session to another because they are not advised what judgment to give.

COLERIDGE, J. If the authority is considered under which the sessions are held, I think it will plainly *934] *appear they are a continuing Court. First of all, the commission directs the justices at sessions to continue process, but does not prescribe any stated period for holding sessions. Then 1 stat. 36 Ed. 3, c. 12, directs that sessions shall be held four times a year; stat. 12 R. 2, c. 10, that sessions shall be held once a quarter; and 1 stat. 2 H. 5, c. 4, s. 2, directs in what weeks the Quarter Sessions shall be held. Still the authority under which sessions are held is precisely the same with that under which they

were held before stated periods were assigned for holding them; and the justices are the same body, in point of constitution, as before. The practice of this Court in issuing writs of mandamus to the sessions to enter continuances and hear an appeal, illustrates the point. Our writ does not give the authority to the sessions to continue process, but merely directs them to exercise the authority which they already possess, and to do that which they ought to have done, in furtherance of the ends of justice. We issue our writ to them for this purpose, after they have completely disposed of a case. This we could not do if each session were a distinct Court. We deal with the justices as one Court sitting from session to session.

ERLE, J. I am of the same opinion. I think the sessions are a continuing Court, and that they have power to adjourn a case from one session to another. And it is most important that they should have such power. I have referred to the case of *Bodmin* v. *Warlingen*, 1 Bott's P. L. 756, pl. 982, 6th ed.,(*a*) which is vouched by Dickinson in support of his position.(*b*) But it certainly appears to me no authority *for holding that the sessions cannot adjourn a case without also adjourning the session. The only difficulty there arose from the [*935 clerk of the peace not having made an entry that the case was adjourned; and the report represents the Court as saying that, if the justices "were divided equally in opinion, that was a sufficient warrant for the clerk of the peace to have entered an adjournment, and it was his duty so to have done." That means, as I understand it, an adjournment of the case, and not of the session. Judgment affirmed.(*c*)

(*a*) S. C., as *Rex* v. *Bodmyn*, Burr. Sett. Ca. 295.
(*b*) P. 61, 5th ed.
(*c*) Reported by H. Davison, Esq.

The CORK and BANDON Railway Company *v.* CAZENOVE.
July 3.

To a declaration in debt for calls, charging defendant as the holder of shares under a railway act incorporated with stat. 8 & 9 Vict. c. 16, it is no answer to plead that defendant, when he became indebted, was an infant; or that defendant is sued as the registered holder of shares, that when he became so registered he was an infant, and that he has not, since he attained his age, been registered anew, or ratified the original registration, or held the shares except as such registered holder as before mentioned.

For (per Lord DENMAN, C. J., and PATTESON, J.), by the express wording of stat. 8 & 9 Vict. c. 16, an infant is liable for calls. At all events (per COLERIDGE and ERLE, Js.), if he is sued after obtaining his age and still holds the shares; for such holding is a ratification.

DEBT. First count, that defendant, before and at the time of the making of the call hereinafter next mentioned, to wit, on 1st October, 1845, was and is the holder of divers, to wit, fifteen shares in the said Company, and was and is indebted to the Company in 57*l.* 10*s.* in respect of one call, made heretofore, to wit, on the day and year afore-

said. The declaration contained six more counts, charging him, as the holder of sixteen shares, on calls made respectively on 7th January, 11th May, 14th July, and 2d November, 1846, and on the 1st January and 4th March, 1847, amounting in all to 317*l.* 10*s.* *"Whereby, and by reason of the non-payment of the said several calls, an action hath accrued to the said Company by virtue of an act of parliament, called," &c. (8 & 9 Vict. c. 16),(*a*) "and of another act of parliament, called," &c. (8 & 9 Vict. c. cxxii., local and personal, public),(*b*) "to demand and have from the defendant the said several sums."

*936]

Second plea, as to the non-payment of the said first, second and third calls respectively in the said declaration mentioned, that at the time of the defendant's becoming indebted as in the declaration mentioned in respect of the said first, second and third calls, and each and every of them, he was an infant within the age of twenty-one years, to wit, of the age of twenty years. Verification.

Last plea, as to the remaining calls, that this action, so far as relates to the non-payment of the said calls, and all causes of action in respect thereof, was and is brought and prosecuted against defendant as the registered holder and not otherwise of the said several shares in respect of which the said calls are respectively claimed as in the said declaration above mentioned; and that, at the time when defendant became and was registered as the holder of the said several shares as aforesaid, and each and every of them, to wit, on 2d March, 1846, defendant was an infant within the age of twenty-one years, to wit, of the age of twenty years: and defendant further says, that he has not at any time *after he became and was such registered shareholder as aforesaid, or since he attained his age of twenty-one years, from thence hitherto, been registered anew or afresh as the holder of the said shares or any of them, or in any way ratified or confirmed such registration as aforesaid, or been the holder of the said several shares save as such registered holder as in this plea above mentioned. Verification.

*937]

General demurrer, and joinder.

Sir *J. Bayley* for the plaintiffs. The question arises on the statute 8 & 9 Vict. c. 16, which is incorporated in this Company's act. By sect. 27 it is provided that on the trial of any action against a shareholder for money due on a call "it shall be sufficient to prove that the defendant at the making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act."(*c*) The effect of

(*a*) Companies' clauses Consolidation Act. Royal assent, May 8th, 1845. Incorporated (by sect. 1) with all acts by which joint stock companies shall thereafter be incorporated for the purpose of carrying on any undertaking.

(*b*) "An Act for making a railway from Cork to Bandon." Royal assent, July 21st, 1845.

(*c*) "And thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the pro-

this enactment is to confine the defendant to certain specified defences; of which infancy is not one. [COLERIDGE, J. There must be some limit to that proposition. The defendant might be a lunatic, or otherwise incapable of contracting.] Although an infant's contract is void, it does not appear that the defendant became possessed of these shares under any contract. He might have acquired them by will. And the *reason why such a defence ought not to be admitted is evident. [*938 Companies have no means of knowing whether the holders of their shares are infants or married women. And stat. 8 & 9 Vict. c. 16, s. 79, expressly recognises the holding of shares by minors, for it enacts that "if any shareholder be a minor he may vote by his guardian." As to the last plea, the question is only whether the defendant has ratified his registration as a shareholder, which took place when he was an infant. As he has had the benefit of the contract, this appears to be beyond a doubt.

Crompton, contrà. It is an old doctrine that the provisions of an act of parliament will be held not to apply to infants, when they create liabilities to which at common law infancy would be an answer. If this were a company merely constituted by deed, it is clear that an infant would not be liable. The rule laid down in *Basset's Case*, Dyer, 136 *a*, 137 *a*, that "an infant in all things which sound to his benefit, shall have favour and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage," answers any argument which may be derived from such contracts being for the defendant's presumed benefit: and the same doctrine, as to the exemption of infants, is laid down in the dicta upon the construction of statutes regarding them, in *Stowel* v. *Lord Zouch*, Plowd. 353, 363, 364. In *Chapple* v. *Cooper*, 13 M. & W. 252, the infant widow's contract for the funeral expenses of her husband was upheld simply on the ground that it was taken to be concerning necessaries for a *persona conjuncta* with herself.

*Sir *J. Bayley*, in reply, was stopped by the Court.

Lord DENMAN, C. J. I entertain no doubt in this case. A [*939 shareholder is liable to the Company for calls, in his character of shareholder. The question is whether the fact of his infancy at the date of his being registered as a shareholder, or of the calls being made, alone, destroys the liability: and I am clearly of opinion that it does not; a shareholder being liable as such. And an infant, by the express words of the act of parliament, is capable of becoming a shareholder.

PATTESON, J. There is no doubt of the general rule at common law, that a contract by an infant may be valid to his advantage and not to his disadvantage. But the question here in my opinion arises wholly on stat. 8 & 9 Vict. c. 16, and the Company's act. An infant must be

scribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

liable for calls lawfully made, because every shareholder is expressly made liable.

COLERIDGE, J. I do not undertake to decide whether a shareholder can be sued while still an infant. That question remains open. But I think, if, having been registered while an infant, he remains a shareholder afterwards, he is clearly liable, and this whether the calls were made during or since his infancy.

ERLE, J. The act of permitting his name to continue registered is in my opinion a ratification. Judgment for plaintiff.(a)

(a) Reported by H. Merivale, Esq.

An attorney admitted in one of the superior courts may (since stat. 6 & 7 Vict. c. 73) maintain an action for his costs in proceedings carried on in another court in which he is not admitted, in the name of attorneys of the latter.

DEBT for work and labour as an attorney: counts for money paid and lent, and on an account stated. Plea, that the action was commenced after the passing of stat. 6 & 7 Vict. c. 73, and that the same is now maintained by plaintiff against defendant for the recovery of certain fees, charges and disbursements claimed by plaintiff to be due to him from defendant for and on account of the prosecuting and defending by plaintiff for defendant of certain actions in the Court of Exchequer at Westminster, and in no other court, in the name of certain other persons, to wit, Messrs. Nicholls and Doyle, and Henry Duncalfe Rushbury, then duly admitted and entitled to act and practise as attorneys of the said Court, as agents of the plaintiff in that behalf; and for no other cause or consideration whatsoever. That the said actions were prosecuted and defended as aforesaid after the passing of the said act of parliament: and that the plaintiff himself was not plaintiff or defendant in any of such actions: and that plaintiff, although he was, at the time of prosecuting and defending the said action, duly admitted, according to the laws in force before the passing of the said statute, as an attorney in and of the Courts of Queen's Bench and Common Pleas, was not admitted in the said Court of Exchequer. Verification.

General demurrer. Ground of demurrer, that the plaintiff, being an attorney of the Queen's Bench, and having conducted defendant's business in the names of *attorneys of the Exchequer as his agents, is entitled to recover in the present action. Joinder.

*941]

The case was argued in this vacation(a) by *Hayes* for the plaintiff, and *Dowling*, Serjt., contrà. *Goodner* v. *Cover*, 3 Dowl. P. C. 424; *Jones* v. *Jones*, 2 M. & W. 323; *Latham* v. *Hyde*, 1 C. & M. 128; S. C. 3 Tyrwhitt, 148; *Meddowcroft* v. *Holbrooke*, 1 H. Bl. 50; *Vincent*

(a) July 5th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

v. *Holt*, 4 Taunt. 452; *Attorney General* v. *Malin*, 2 Cro. & J. 500, S. C. 2 Tyrwh. 512; *In re Hodgson* and *Ross*, 3 A. & E. 224; *Thursby* v. *Warren*, Cro. Car. 139, were cited in reference to the practice under former statutes. But the main arguments turned on the provisions of stat. 6 & 7 Vict. c. 73, and are noticed in the judgment.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action on an attorney's bill of costs. (His Lordship then stated the plea.) And the question is neatly raised, whether an attorney, of the Queen's Bench or Common Pleas only, can recover for work done by him in the Court of Exchequer through the agency of an attorney of the last named Court.

This privilege, by which an attorney of one court may practise in another court, in which he is not admitted, in the name of an attorney of that other court, was given by stat. 2 G. 2, c. 23, s. 10, in express terms; and by stat. 7 W. 4 & 1 Vict. c. 56, s. 4, an attorney *of one court was enabled to practise in his *own name* in another court in which he was not admitted. But stat. 1 & 2 Vict. c. 45, s. 3, confines it to such attorneys as shall sign the roll of the court in which they are to practise. The whole of the last named act, however, as well as this enactment in the two former, is repealed by the general act 6 & 7 Vict. c. 73: and we are to inquire whether any provision of this general act prevents the present plaintiff from recovering on this bill: and the meaning of the words of sect. 35 which are supposed to do so, "in case any person shall in his own name or in the name of any other person sue out any writ," &c., "in any court" "without being admitted and enrolled as aforesaid," he shall not recover his costs, must be sought in what had been antecedently enacted by that statute respecting the admission and enrolment of attorneys. [*942

The 2d section is here directly referred to. "No person shall act as an attorney," "unless such person shall have been admitted and enrolled and otherwise duly qualified to act as an attorney," "pursuant to the directions and regulations of this act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting" as such attorney. But the plaintiff appears by the plea itself to be duly admitted according to the statute as attorney of the two Courts of Queen's Bench and Common Pleas, and, therefore, has the general capacity to practise as an attorney.

The 27th section applies to persons duly admitted, as attorneys of any one superior court, to practise in any other court, and permits them to do so, "upon signing the roll of such other Court." This the plaintiff has not done; and, therefore, he could not *have practised in the Exchequer in *his own* name. No provision has been made for the precise position in which he stands: but the 35th section contemplates the practising by one person in the name of another, and [*943

allows him to recover his costs; a privilege of little or no value, if his being on the roll of the Court is necessary to enable him to practise in it; for then he could practise there in his *own name*.

It may be observed that the first section of stat. 2 G. 2, c. 23, requires every attorney to be admitted and enrolled in such of the courts where he *shall act as* an attorney: therefore the 10th section was necessary to enable him to act in the name of another attorney in a court in which he was not himself admitted. But the present act, 6 & 7 Vict. c. 73, s. 2, has not the words "in such of the courts where he shall act as an attorney," but prohibits an attorney to practise unless he is admitted and enrolled and otherwise duly qualified to act as an attorney," "pursuant to the directions and regulations of this act:" which words being general, it was probably thought unnecessary to have an express clause to enable an admitted attorney of one court to practise in another court in the name of an admitted attorney of that Court, although it was necessary to provide for his practising in *his own* name in such other Court.

The result is, that the plaintiff, being duly admitted and enrolled in the Queen's Bench, and having, in the name of an attorney in the Exchequer, sued out writs in that Court, is under no disability with respect to the recovery of his bill of costs. Judgment for plaintiff.(a)

(a) Reported by H. Merivale, Esq.

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*944] *The following case of the last term was, by accident, not inserted in its proper place.

NICKELLS *v.* ATHERSTONE. [*June* 12.]

Defendant held premises as tenant to plaintiff under a memorandum of agreement for three years. He left the premises in the first year. On application being then made by plaintiff for rent due, defendant, by letter, authorised plaintiff to let the premises to any one else. Plaintiff then let them to another tenant for three years, and gave him possession. *Held*, in an action of debt on the original agreement, that these facts constituted a surrender by operation of law.

DEBT on a demise of rooms, &c., by plaintiff to defendant for three years from March 1st, 1844, at the yearly rent of 100*l.* payable quarterly in advance: averment, that defendant entered, and was possessed until 1st September, 1845.

Pleas. 1. Traversing the demise. 2. Eviction by plaintiff. 3. Surrender. Traverses of pleas 2 and 3.

On the trial, before WIGHTMAN, J., at the London sittings after Easter term, 1846, the following appeared to be the material facts. The rooms were let by plaintiff to defendant under a memorandum of agreement dated 26th February, 1844, on the terms specified in the declaration. The defendant entered, and paid rent for the first two quarters, beginning respectively March 1st and June 1st, 1844. In August, 1844, the defendant removed his property from the rooms and left them, and

applied to the plaintiff to take them off his hands. The plaintiff refused. The defendant then asked the plaintiff to let the rooms for him; and the plaintiff said he would try to do so. On 3d September, 1844, the defendant being then absent, the plaintiff applied to his daughter for the rent due on 1st September. In reply, the following letter was written by the defendant to the plaintiff.

"Edinburgh, 11th September, 1844.

"Sir:—I heard from my daughter that you *expressed your intention to take legal measures against me unless the ensuing quarter rent were paid on the very day commencing the quarter. I consider such a step would be harsh; and under present circumstances it would be utterly useless. It will probably be six months before I can finally leave Scotland, as the greater part of my business connection lies in this country. I trust, however, that you may be able to let the rooms to some other person, and on better terms. "E. ATHERSTONE." [*945

On 29th September, 1844, the plaintiff, without any further communication with the defendant, let the room in question, together with some others, to a Mr. Bullock, for three years from that day, at 120*l.* a year, payable quarterly in advance. Mr. Bullock paid the first two quarters, but subsequently became insolvent. The present action was then brought, claiming from the defendant the four quarters' rent from September 1st, 1844, to September 1st, 1845, under the agreement of February, 1844; but credit was given to the defendant for the first two quarters' rent, which the plaintiff had received from Bullock.

WIGHTMAN, J., left it to the jury to say whether the plaintiff agreed to the terms offered by the defendant in his letter of 11th September, and accepted Bullock as his tenant in substitution and discharge of the defendant. The jury found that the plaintiff did accept Bullock as his tenant in discharge of the defendant. Verdict for the plaintiff, under the direction of the learned Judge, on the first issue, for the defendant on the other issues, with leave to the plaintiff to move to enter a verdict for himself for 50*l.*, on either or both the other issues.

A rule nisi having been accordingly obtained,

*_Bramwell_, in this term, showed cause.(a) The tenant has by writing consented to the reletting of the premises; and the landlord has relet them: and the question is, whether the landlord can still maintain this action. In the first place this is a surrender by act and operation of law, on the principle recognised in *Thomas* v. *Cook*, 2 B. & Ald. 119; *Walker* v. *Richardson*, 2 M. & W. 882; *Reeve* v. *Bird*, 1 C. M. & R. 31, S. C. 4 Tyr. 612, and *Bees* v. *Williams*, 2 C. M. & R. 581, S. C. Tyr. & G. 23: and *Thomas* v. *Cook* was treated as a case of authority in *Doe dem. Hull* v. *Wood*, 14 M. & W. 682. It is true that in *Lyon* v. *Reed*, 13 M. & W. 285, a doubt had been previously cast by the Court of Exchequer on the authority of *Thomas* v. *Cook*, and *Walker* [*946

(a) May 25th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

v. *Richardson*. But it is said (p. 309) that perhaps the former "case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation." If so, the defendant here has been evicted, and is entitled to succeed on that issue. [PATTESON, J. How could there be an eviction, if the defendant assented?] If there was no surrender, the plaintiff could justify his putting in a new tenant only on the ground of leave and license: but no such leave was given; for the letter which must be relied upon as showing it was conditional on the plaintiff's allowing the defendant to give up the tenancy.

*947] *But, in addition to this, the letter of 11th September was itself sufficient to surrender the term, under stat 29 C. 2, c. 3, s. 3. No particular form of words is necessary where the intention is manifest; *Farmer dem. Earl* v. *Rogers*, 2 Wils. 26.

Watson and *Hugh Hill*, contrà. 1. This is no surrender by operation of law. That is defined in *Lyon* v. *Reed*, 13 M. & W. 306, to be "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist." Therefore, as the Court goes on to show, the intention of the parties has nothing to do with it. That the particular tenant "agrees to an act done by the reversioner is not sufficient." This case, and the authorities cited in Com. Dig. *Surrender*, (I 1) and (I 2), fully bear out the proposition; and the principles established by those authorities must be looked to as fixing the principle of surrender by operation of law, rather than modern cases, the earliest going no farther back than 1812. A mere naked consent by the defendant is no estoppel: to which point *Swift* v. *Heath*, Carthew, 110,(*a*) is cited. [PATTESON, J., referred to *Gore* v. *Wright*, 8 A. & E. 118.] There, the agreement was specially pleaded to an action of debt for rent, as a contract by the plaintiff to forego the rent. 2. Nor is the letter a surrender in writing. That no particular form of words is necessary to constitute a surrender under the Statute of Frauds is true: but the words must imply an immediate surrender: here,

*948] nothing of the kind *appears in the letter, but a mere request to the landlord to relet, which is obviously inconsistent with its containing an immediate surrender; *Weddall* v. *Capes*, 1 M. & W. 50; S. C. Tyr. & G. 430. And *Doe dem. Murrell* v. *Milward*, 3 M. & W. 328, and *Doe dem. Johnstone* v. *Huddlestone*, 4 B. & C. 922, equally show that these prospective words do not constitute a surrender. 3. Neither can the putting in a new tenant be regarded as an eviction by the landlord, the defendant himself having expressly assented to it.

Undoubtedly *Thomas* v. *Cook*, 2 B. & Ald. 119, can hardly be dis-

(*a*) See Bro. Ab. tit. *Surrender*, pl. 48.

tinguished from this case; but that, as far as regards the points in question, must be considered as overruled, and rightly, by *Lyon* v. *Reed*, 13 M. & W. 285, 305—310. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

In this case, the defendant being the lessee in possession of the premises, the plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged the defendant from his liability as tenant.

The Judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plaintiff's claim for rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon* v. *Reed;* but we are of opinion that it is correct. If the expression "surrender by operation of law" be properly "applied to cases where the owner of a particular estate has been party to some act, the validity of which *he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued," it appears to us to be properly applied to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter. [*949

If the defendant cannot technically be said to be estopped from disputing the validity of the estate of the new tenant, still, according to the doctrine of *Pickard* v. *Sears*, 6 A. & E. 469, he would be precluded from denying it with effect; and the result is nearly the same as an estoppel. If an act which anciently really was, in contemplation of law, and has always continued to be, an act of "notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like,"(*a*) be required as requisite for a surrender by operation of law, and if the acts of the three parties are regarded together, this requisite is here found. Indeed the notoriety is essentially greater than that which accompanies a parol redemise between the same landlord and tenant, which is a clear surrender by operation of law. In the present case three are concerned, and there is an actual change of possession: in the other, *two are concerned, and there is no change of possession. This surrender by operation of law has been judicially recognised in each of the superior courts; *Matthews* v. *Sawell*, 8 Taunt. 270, *Thomas* v. *Cook*, 2 B. & Ald. 119, *Walker* v. [*950

(*a*) *Lyon v. Reed*, 13 M. & W. 309.

Richardson, 2 M. & W. 882, *Bees* v. *Williams*, 2 C. M. & R. 581, S. C. Tyr. & G. 23: and held valid at Nisi Prius in *Stone* v. *Whiting*, 2 Stark. N. P. C. 235, and many subsequent cases. When the decisions on a point are numerous and uniform, and carry into effect the lawful intentions of the parties according to the truth, and are opposed by no principle, the law on the point ought not to be considered doubtful because the reported decisions are only of modern date, as the fact that the reports on the point do not begin till lately may arise from there being no question on the point in earlier times. Indeed, in 1809, it seems probable that a restoration of the possession to the landlord and a discharge of the tenant by him was considered a surrender by operation of law. The defence in *Mollett* v. *Brayne*, 2 Campb. 103, was shaped on that principle: but, as the evidence failed to show a change of possession by mutual consent of landlord and tenant, the defence failed. In *Whitehead* v. *Clifford*, 5 Taunt. 518, where there was such change of possession by mutual consent, the defence to a claim for use and occupation succeeded; and the Court distinguished the case from *Mollett* v. *Brayne* for that reason.

Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved, as a surrender

*951] *by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence. Although we do not assent to the observations upon the line of cases, from *Thomas* v. *Cook* (2 B. & Ald. 119) downwards, in the learned and able judgment given in *Lyon* v. *Reed*, 13 M. & W. 285, we wish to express our entire concurrence in the decision of that case. The question there was not upon the estate of the tenant in possession of the premises, but upon the title of the plaintiff as assignee of the reversion; whether a lease of the reversion, granted to Ord and Planta in 1812, for ninety-nine years, could be presumed to be surrendered, from the fact that such lease was found among the deeds of the tenant in fee, who had granted in 1814 a term in the reversion to Osborne and Burt, through whom the plaintiff claimed. There was no change in the possession of the land. No actual change in the possession of the reversion could be made apparent; and the facts stated lead to the conclusion that Ord and Planta did not know of the demise to Osborne and Burt; but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease.

As the defendant is entitled to our judgment on this point, it is not necessary to consider the effect of his letter as evidence of a surrender.

Rule discharged.(*a*)

(*a*) Reported by H. Merivale, Esq.

See Note to *Doe dem. Christmas* v. *Oliver*, 2 Smith's Lead. Ca. 459 *a*, 459 *i* (3d ed.); and *Creagh* v. *Blood*, 3 Jones & Latouche, 133, there cited.

*ELLIS and Others v. RUSSELL and Others. [*952

Defendants, on whose petition a fiat in bankruptcy had issued, received a payment from the bankrupt, whereby they obtained more in the pound than his other creditors. The fiat, not having been proceeded in, was annulled; and another fiat issued on the petition of a creditor whose debt was due before the payment made to defendants.

Held: That this payment was an act of bankruptcy within stat. 6 G. 4, c. 16, s. 8, on which the last fiat was sustainable, and that, as no person had been appointed by the Commissioners, under that section, to whom the money paid was to be returned by defendants, the assignees of the bankrupt were entitled to recover it.

ASSUMPSIT for money had and received by defendants to the use of plaintiffs, as assignees of Vardy, a bankrupt, after his bankruptcy, and after plaintiffs became his assignees.

Plea. Non assumpsit. Issue thereon.

The cause was tried before TINDAL, C. J., at the Staffordshire Summer assizes, 1844, when a special verdict was taken. The following were the material facts found.

In November, 1840, one of the defendants, Russell, on behalf of himself and the other defendants, his copartners, being creditors of Vardy to the amount of 500*l.*, filed an affidavit of debt in the Bankruptcy Court, and, on 3d December, they served him with such affidavit, and notice to pay, under stat. 1 & 2 Vict. c. 110, s. 8. Vardy did not within twenty-one days after such service either pay or find security, or give a bond, as required by the above mentioned section. On 31st December, 1840, the plaintiff, Ellis, who was also a creditor of Vardy at the time of the service of such affidavit and notice, and default, sued out a fiat against him. On 30th January, 1841, this fiat was annulled on the petition of defendants, who sued out a second fiat on the following day. On 17th February, 1841, defendants and Vardy, well knowing all the premises, agreed that an action, which had been commenced by them against him, for their said debt, before filing the above mentioned affidavit, should be compromised, on *the terms, that Vardy should immediately pay them 250*l.* in part payment of their debt; that [*953 he should also pay their costs of action and of the fiat three days after bill delivered; and that he should consent to a Judge's order to pay the residue of his debt by two instalments at nine and twelve months. On the same day Vardy paid them 250*l.* accordingly, and 25*l.* for costs. By means of these payments the defendants received more in the pound than Vardy's other creditors. On 9th September, 1842, the fiat last issued was duly annulled on the petition of Ellis, who continued to be a creditor for his debt aforesaid: and he on the same day sued out another fiat. In pursuance of this last fiat, Vardy was in the same month duly declared bankrupt; and Ellis and the other plaintiffs were duly appointed assignees. "But whether or not upon the whole matter," &c.

The case was argued during the last term(*a*) by

(*a*) June 8th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

Cowling, for the plaintiffs, and *Lush*, for the defendants. The following authorities; *Ledbetter* v. *Salt*, 4 Bing. 623; *Ex parte Browne*, 15 Ves. 472; *Rose* v. *Main*, 1 Bing. N. C. 357; *Davis* v. *Holding*, 11 A. & E. 710, and *Belcher* v. *Sambourne*, 6 Q. B. 414; were cited during the argument, a further report of which is rendered unnecessary by the judgment of the Court. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (June 26th), delivered judgment.

*954] *When the facts and dates in this case are attentively considered, it will be found that the questions in it are reduced to one.

An affidavit was filed by the defendant Russell against the bankrupt under stat. 1 & 2 Vict. c. 110, s. 8, of which notice was given on the 3d of December, 1840. The requisites of that statute were not complied with by the bankrupt; therefore, on the twenty-second day after notice of the affidavit, an act of bankruptcy was committed, provided a fiat were issued within two months. On the 31st of December a fiat in bankruptcy was issued on the petition of the plaintiff Ellis, who had then a sufficient petitioning creditor's debt. That fiat was annulled on the 30th of January on the petition of the defendants, they being the parties who had filed the affidavit, and were entitled to preference as petitioning creditors. They issued a second fiat on the 31st January, grounded on the act of bankruptcy under stat. 1 & 2 Vict. c. 110. But that fiat was not proceeded in, and was afterwards annulled on the 9th of September, 1842, on the petition of the plaintiff Ellis. On that same day a third fiat issued, on the petition of the plaintiff Ellis, he continuing to be a creditor as he was in December, 1840; and under that fiat the plaintiffs were chosen assignees. Now that fiat, not being sued out within two months of the twenty-one days from the notice of the affidavit made under 1 & 2 Vict. c. 110, cannot be supported on the ground that non-compliance with the requisites of the statute in respect of that affidavit was an act of bankruptcy, unless the mere fact of a fiat (although afterwards annulled) having issued within two months constitutes an act of bankruptcy for ever and for all purposes, or unless the third fiat can be con-

*955] nected with and treated as a sort *of continuation of the first; neither of which propositions seems to us to be tenable. But, as our judgment proceeds on other grounds in favour of the plaintiffs, those propositions need not be absolutely decided upon.

It appears, however, that, whilst the second fiat was in force, although not acted upon, the defendants, on whose petition it had issued, on the 17th of February, 1841, received from the bankrupt, both parties being well aware of the fiat, the sum of 250*l.* in part payment of their debt; and 25*l.* for the costs of an action which had been commenced, and did thereby receive more in the pound than the other then creditors of the bankrupt. This payment constituted a plain and undoubted act of bank-

ruptcy under the statute 6 G. 4, c. 16, s. 8; and upon this act of bankruptcy the fiat issued by the plaintiff Ellis on the 9th of September, 1842, is clearly sustainable; for the statute 5 & 6 Vict. c. 122, s. 7, which limits the time for issuing a fiat upon such an act of bankruptcy to one year after the payment of the money, did not come into operation till the 11th of November, 1842, after the present fiat had issued.

Now this action is brought by the assignees to recover the sums so paid, as money had and received to the use of the assignees; and, according to the general course and operation of the Bankrupt Laws, there is no doubt that they might be so recovered, in the same manner as sums paid by way of fraudulent preference, such preference constituting an act of bankruptcy, are constantly recovered, the petitioning creditor's debt existing, as it did here, before the payment. But in this case it is said that the general course and operation of the Bankrupt Laws will not entitle the plaintiffs to recover, because the same section, 6 G. 4, c. 16, s. 8, *which constitutes the act of bankruptcy, provides that "every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction or security as aforesaid, or the full value thereof, *to such person* or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt;" and the present plaintiffs have not been so appointed in this case to sue for the money; and the case of *Belcher* v. *Sambourne*, 6 Q. B. 414, was cited as an express authority on this point. In that case, however, the fiat was grounded and supported on an act of bankruptcy long subsequent to the payment of the money sought to be recovered, and not on the act of bankruptcy arising from the payment itself. The point in the present case was not raised; why it was not, does not appear. Very probably it was because the petitioning creditor's debt on which the fiat issued became due subsequent to the payment in question, whereas here it was due long before. And this circumstance may furnish a clue to the meaning of the latter part of the 8th section of 6 G. 4, c. 16, which appears to have been intended to reach those cases to which the general course and operation of the Bankrupt Laws would not apply, namely, where the assignees could not sue by reason of the date of the petitioning creditor's debt, or by reason of having themselves or one of them received the payment in question, or other reasons which may easily be suggested, and yet it was fit and proper that the sum so paid should be recovered for the general *body of creditors. It does not however follow that, where there is no necessity for, and therefore, in fact, no such special interference and appointment by the commissioners of a person to sue for the money, the assignees, who have the power under the general course and operation of the Bankrupt Laws,

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may not themselves sue for and recover it; otherwise the creditors to whom it undoubtedly belongs might be deprived of it.

We are clearly of opinion that the assignees may recover under the circumstances of this case, the payment itself being an act of bankruptcy upon which the present fiat may be supported, and being therefore void as against the present plaintiffs, the assignees. The verdict must be entered for the plaintiffs. Judgment for plaintiffs.(*a*)

(*a*) Reported by H. Davison, Esq.

DOE on the demise of WILKINSON *v.* GOODIER. *July* 7.

Mortgagee, under a special power in the mortgage-deed, enabling him to distrain for arrears of interest "in like manner as for rent," distrained after the date of the demise in the declaration, but for arrears due before such demise, the mortgagor having (without any express provision in the deed enabling him so to do) continued in possession.

Held, that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgagee from bringing ejectment.

EJECTMENT for a messuage and lands in the county of Chester. Demise, 2d October, 1846.

On the trial, before COLTMAN, J., at the Cheshire Spring assizes, 1847, it appeared that the lessor of the plaintiff claimed as mortgagee, under indentures of lease and release, dated 18th and 19th October, 1842, whereby the defendant mortgaged the premises in question to secure a sum of 500*l.*, payable on 19th August following. The indenture of release contained a *covenant for payment of principal, and also interest thereon, half yearly, on the said 19th August and on 19th February; and power for the mortgagee to take possession in case of default; and also a proviso that, in case the interest upon the said sum of 500*l.* after the rate aforesaid, or any part thereof, should be due and in arrear for the space of twenty-one days after either of the said days appointed for payment thereof as aforesaid, it should be lawful for the mortgagee, his heirs and assigns, to enter into and upon all or any of the said mortgaged hereditaments and premises, in the actual occupation of defendant, his heirs and assigns, and to distrain thereon for such interest, "in like manner as for rent reserved by lease." The deed of release did not contain any clause permitting defendant to remain in possession so long as he should continue to pay the interest; but he had, in fact, continued in possession from the date of the mortgage down to the trial of the cause, at which time interest for a year and a half was in arrear. On 1st March, 1847, the lessor of the plaintiff distrained, under the above proviso, for the said arrear; but the distress was withdrawn, on the ground that, as to the last half year's interest, the twenty-one days limited by the proviso had not expired. A fresh distress for the year's interest only, due 19th August, 1846,

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was subsequently put in, which also was withdrawn on account of some supposed informality.

For the defendant, it was contended that, either by allowing him to remain so long in the occupation of the premises, or by distraining for interest as aforesaid, the lessor of the plaintiff had recognised the defendant as his tenant, and that, therefore, he could *not maintain ejectment without having first given him a notice to quit; and *Evans* v. *Elliot*, 9 A. & E. 342, was cited. The learned judge overruled the objections, and directed a verdict for plaintiff, giving defendant leave to move to enter a nonsuit. In Easter term last, [*959

Townsend moved accordingly.(*a*) The plaintiff, by exercising his power to distrain as for rent in arrear, recognised the defendant as his tenant. In *Doe dem. Whitaker* v. *Hales*, 7 Bing. 322, where the attorney for the mortgagee, being also attorney for the mortgagor, applied to the tenant in possession of the mortgaged premises for rent, in order to pay the interest due upon the mortgage, and threatened to distrain if the rent was not paid, this was held to be such a recognition of the lawfulness of the tenant's possession, that the mortgagee could not recover upon a demise laid on a day prior to such application. In *Doe dem. Rogers* v. *Cadwallader*, 2 B. & Ad. 473, the mere fact of the mortgagee having received interest down to a time later than the day of the demise in the declaration was held not to amount to a recognition by him that the mortgagee, or his tenant, was in lawful possession until the time when such interest was paid. But Lord TENTERDEN distinguished this from the former case, on the ground that the mortgagee in that case, by his demand of rent, had recognised and availed himself of the tenant's possession, and therefore could not treat him as a trespasser at an earlier period. In *Evans* v. *Elliot*, Lord DENMAN, C. J., observes "that a mortgagee may so bind himself by his own conduct as to be *precluded from treating the mortgagor's lessee as a trespasser: what conduct might amount to a recognition, seems to me rather matter of evidence than of law: but I confess that *Doe dem. Whitaker* v. *Hales* appears to me, though doubted by my brother LITTLEDALE in *Doe dem. Rogers* v. *Cadwallader*, to be well decided. I am by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued." [Lord DENMAN, C. J. We should wish to see the deeds.(*b*)] *Cur. adv. vult.* [*960

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an ejectment by mortgagee against mortgagor. A doubt

(*a*) April 20th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

(*b*) The deeds were not in Court when the motion was made.

was raised whether defendant was not entitled to a nonsuit; and a rule was moved for on the point reserved.

The mortgage deed contained a power in the mortgagee to enter and distrain upon the premises for interest if unpaid for a certain length of time, *as for rent;* and the lessor of plaintiff had in fact so entered and distrained at a period later than that of the demise laid in the declaration, but for interest accruing before the day of demise; and this act of his was said to be a recognition of the defendant as a tenant. On looking at these very prolix deeds, we think that the absolute conveyance *961] *to the mortgagee in default of payment at the time specified, and long since passed, is not at all qualified by the power to enter and distrain for accruing interest. That is a power wholly collateral, which, though it could not indeed be exercised unless the defendant were actually in possession, and is confined by the deeds to such part of the premises as shall be in the actual occupation of the mortgagor, does not create any right inconsistent with that of the mortgagee to recover by virtue of this conveyance to him, there being no clause that the mortgagor shall continue to hold possession so long as he shall pay interest, though he covenants to do so. The word *rent* does not require that a tenancy should exist at the time of distraining, but only directs the mode of dealing with the distress. *Doe dem. Whitaker* v. *Hales*, 7 Bing. 322, therefore does not apply: and *Doe dem. Rogers* v. *Cadwallader*, 2 B. & Ad. 473, is adverse to the defendant.

Rule refused.(*a*)

(*a*) Reported by H. Davison, Esq.

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*962] *The QUEEN *v.* JAMES LANCASTER.

By charter of 13 C. 2, the borough and inhabitants of Leeds were incorporated; the mayor, recorder, deputy recorder and aldermen for the time being were constituted justices of the peace; and a gaol was granted to them, of which the mayor was to be the keeper. From 1757 to 1813 the borough had a prison, without a residence for the gaoler, for the confinement of prisoners until examination; and the keeper was appointed by the corporation. After examination, the prisoners who were committed for trial, were sent either to York castle or Wakefield gaol, to the expenses of which the borough contributed. Under local acts of 49 and 55 G. 3, a new prison was erected with a residence for a gaoler. This prison, which, like the former, was used for temporary confinement only, was vested by these acts in the borough justices, who were empowered to make orders for its regulation, and to appoint the gaoler. The first-mentioned act saved the rights and franchises of the corporation.

A third gaol was subsequently built, under the provisions of the gaol acts from stat. 4 G. 4, c. 64, to stat. 2 & 3 Vict. c. 56, by the town council.

Held, that the right of appointing the keeper of this gaol related to the business of a Court of criminal judicature, within stat. 6 & 7 W. 4, c. 105, s. 8, and to the regulating of gaols, within stat. 7 W. 4 & 1 Vict. c. 78, s. 38, and was vested, not in the mayor, or recorder, or town council, but in the justices of the borough.

COWLING, on a former day in this term, obtained a rule to show cause why an information in the nature of a quo warranto should not be exhibited against the defendant, to show by what authority he claimed to

hold the office of gaoler or governor of the borough gaol in and for the borough of Leeds in the county of York; upon the ground that he was not duly appointed to the said office.

The following facts were stated in the affidavits upon which the rule was obtained. The borough and inhabitants of Leeds were incorporated by charter of 13 Charles 2 (still in force, except so far as it may be modified by the statutes after mentioned), under the name of "The Mayor, Aldermen and Burgesses of the Borough of Leeds, in the County of York." By the same charter it was granted and declared that there should be a recorder, to be from time to time appointed by the crown, with power for the recorder to appoint a deputy; that the mayor, recorder, deputy recorder and aldermen for the time being should be justices *of the peace for the borough; and that they should [*963 have power to hold general quarter sessions and other sessions of the peace, and should have power to commit all persons charged with felony and other offences therein mentioned to the common gaol of the county of York. It was further granted by the charter that the mayor, aldermen and burgesses might hold within the borough one prison or common gaol for the custody of offenders, and that the mayor and his successors should have the custody and rule of such gaol. A separate Court of Quarter Sessions was granted to the borough, and a recorder appointed under stat. 5 & 6 W. 4, c. 76. Ever since the grant of the charter the justices and recorder of the borough have been accustomed to commit to the castle of York persons charged with felonies and other offences for trial at the county assizes, and also persons convicted of felonies and misdemeanours at the borough Quarter Sessions; and also to commit persons to the gaol or house of correction at Wakefield, in the West Riding, as well on charges of felony and misdemeanour, and until their trials at the Quarter Sessions of the borough, as also in execution of convictions at the borough Petty Sessions. The inhabitants of the borough have always contributed to the expense of these gaols. Before the passing of stats. 49 G. 3, c. 122, and 55 G. 3, c. xlii., more particularly noticed hereafter, there was a prison, or lock-up house, within the borough, having no residence for a gaoler or other officers attached to it, in which persons charged with criminal offences within the borough were detained until they could be examined, and discharged, or finally committed either for trial or in execution to one or other of the two county prisons above *mentioned. From 1757 to 1813 the corporation [*964 appointed the gaoler of this borough prison.

By stat 49 G. 3, c. 122 (local and personal, public), entitled an act (inter alia) "for erecting a court house and prison for the borough of Leeds," ss. 14, 23, the justices of the borough were authorised to erect a prison for the borough, and to make rates for the cost thereof; and such prison was vested in the justices for the time being. By sect. 43, the powers, privileges, franchises, and authorities of the borough were

expressly preserved. By stat. 55 G. 3, c. xlii. (local and personal, public), entitled (inter alia) "An act to amend and enlarge the provisions" of the last mentioned act, ss. 4, 5, the said justices were empowered to make orders for the regulation of the prison, and to appoint the gaoler thereof, and other officers. Under these local acts, a prison, with a residence for a gaoler, and other buildings, attached thereto, was erected. Such prison, however, was not adapted, nor was it used, for the detention of prisoners, except temporarily for a few days, and until they could be committed to the two county gaols as aforesaid. In pursuance of these acts, the borough justices appointed a gaoler, who held office until his death in 1835, when they appointed a successor, who has ever since continued to discharge the duties of the office.

Another gaol had recently been built for the borough by the town council, at the cost of the inhabitants, under the provisions of the Gaol acts, 4 G. 4, c. 64, 5 G. 4, c. 12, and 5 G. 4, c. 85, and of the Municipal corporation acts, 5 & 6 W. 4, c. 76, 6 & 7 W. 4, c. 105, and 7 W. 4 & 1 Vict. c. 78. The town council in May last appointed the defendant

*965] governor of this gaol. He received also a *separate appointment to the same office from the mayor. The validity of this appointment was disputed by the justices, on the ground that they themselves had the right of appointment.

Cause was shown against the rule, during the last term(*a*), by

Baines, for the Mayor, *R. Hall*, for the Recorder,(*b*) and *J. Addison*, for the town council.

Cowling argued in support of the rule.

The argument is so fully noticed in the judgment of the court, that it is sufficient to mention the authorities cited: which were *Regina* v. *The Bishop of Bath and Wells*, 5 Q. B. 147; *Smith* v. *Hillier*, Cro. Eliz. 167; *Rex* v. *Varlo*, 1 Cowp. 248; *Regina* v. *The Recorder of Hull*, 8 A. & E. 638; *Palmer* v. *Powell*, 6 M. & W. 627, and *Hammond* v. *Peacock*, 1 Exch. 41. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (June 26th), delivered the judgment of the Court.

In this case the question has been raised, in whom is the right of appointment to the office of gaoler of the new prison and house of correction, lately completed in the borough of Leeds. All parties agree to

*966] *be bound by our opinion: and we have come to the conclusion that the right is in the justices of the borough.

The affidavits show that originally there was a prison for temporary confinement without a residence for a gaoler, and that the corporation appointed that officer. This prison being inadequate, a second prison

(*a*) June 10th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and ERLE, Js.

(*b*) *Hall* stated that he was instructed to state the grounds on which it had been suggested that the Recorder, in that character, was entitled to appoint; but that the Recorder himself was of opinion that he had not the right.

and house of correction, with residence for a gaoler, was built under the local acts 49 G. 3, c. 122, and 55 G. 3, c. xlii.; and the power of appointing the gaoler thereto was vested in the justices of the borough in quarter sessions by sect. 5 of stat. 55 G. 3, c. xlii.

This prison and house of correction being also inadequate, a new prison has been built as a substitute for it, under the provisions of the acts relating to gaols from stat. 4 G. 4, c. 64, to stat. 2 & 3 Vict. c. 56.

If the new prison, being substituted for the former gaol, is subject to the power of appointment which related to that gaol, the right of the justices is established. But our decision in their favour is not rested on this ground.

As the new prison was built under the powers of stat. 4 G. 4, c. 64, extended by subsequent acts, the provisions of that statute relating to the appointment of the gaoler are applicable. By sect. 25 the justices in quarter sessions are empowered to appoint the keepers for every prison within their jurisdiction, to which this act shall extend, except the keeper of the common gaol. This act extended only to the boroughs named in the schedule (A) thereof, Leeds not being one: but the provision relating to the power of appointment appears to be extended to the justices of this borough by stat. 7 W. 4 & 1 Vict. c. 78, s. 38, enacting "that *all the powers of regulation" which, before the passing of stat. 5 & 6 W. 4, c. 76, "were possessed by the justices having the government or ordering of any" "gaol or house of correction" belonging to any borough named in the schedule of stat. 5 & 6 W. 4, c. 76, "and all things by any act of parliament provided to be done" at any quarter sessions of the peace "in relation to the regulating of any such gaol or house of correction" shall, subject as mentioned, be exercised by the justices of the borough to which such gaol or house of correction shall belong, at a quarterly session held for that purpose. The power of appointing a gaoler appears to be a thing in relation to the regulating a gaol, provided, as well by stat. 4 G. 4, c. 64, as by the local acts, to be done at a quarter sessions of the peace in respect of the prisons within the jurisdiction of the justices in those acts respectively mentioned, and therefore to be conferred on the justices of this borough. If the power had not been conferred on the justices by these acts, we think that stat. 2 & 3 Vict. c. 56, s. 1, extending to all gaols and houses of correction in England the provisions of stat. 4 G. 4, c. 64, subject to exceptions not here applicable, would have operated to confer it. This view is in accordance with *Hammond* v. *Peacock*, 1 Exch. 41.

[*967

It was contended for the mayor that the right to appoint in respect of this prison was vested in him by the charter, and was not vested in the justices by stat. 4 G. 4, c. 64, s. 25, because it was a common gaol. But, as the new prison is a substitute for that built under the local acts,

*968] and now become inconvenient in respect *of size and situation, if the statutes relating to gaols did not apply, the claim for the justices under the local acts would in our judgment be preferable to that of the mayor under the charter. Also, by reason of the same substitution, we are of opinion that the new prison is not shown to be included in the term common gaol, which can be clearly applied in respect of county gaols, but is undefined in respect of boroughs; the affidavits moreover showing that, in respect of this borough, the gaols of York Castle and of Wakefield House of correction have been, and yet are, used as the common gaols of the borough. This decision does not conflict with *Regina* v. *The Bishop of Bath and Wells*, 5 Q. B. 147, which rested on the fact that the town council of Bath were de facto in the exercise of the franchise of appointing a gaoler, and, therefore, had the appointment of a chaplain under stat. 2 & 3 Vict. c. 56, s. 15, whereas, in the present case, before the year 1815 the mayor took no part, except as member of the corporation, and since 1815 has taken no part, in the appointment of a gaoler.

It was submitted for the Recorder that, by stat. 5 & 6 W. 4, c. 76, s. 105, the cognisance of all matters cognisable by the Quarter Sessions for a county is vested in him (see *Regina* v. *The Recorder of Hull*, 8 A. & E. 638, *Regina* v. *St. Lawrence Ludlow*, 11 A. & E. 170), and, as the justices in Quarter Sessions, under stat. 4 G. 4, c. 64, s. 25, could appoint a gaoler, he had the same power, and, further, that stat. 7 W. 4 & 1 Vict. c. 78, s. 38, did not take that power from him, and vest it in the justices of the borough, because it was confined to the *969] powers of *regulating gaols, given by stat. 4 G. 4, c. 64, and the power of appointing a gaoler is not included under a power of regulating gaols. But we are of opinion that sect. 38 last mentioned does relieve the Recorder from this duty. Stat. 4 G. 4, c. 64, according to its title, consolidates "the laws relating to the building, repairing and regulating" gaols; and it contains various provisions for appointment of gaolers and other officers. By stat. 7 W. 4 & 1 Vict. c. 78, s. 37, the powers provided by stat. 4 G. 4, c. 64, for building and repairing gaols were vested in the town council; and by sect. 38 the powers provided in relation to the regulating of any borough gaol were vested in the justices. We consider that in this division the power of appointing a gaoler was not omitted; and, as it is not in the part relating to building and repairing, it was included in the part relating to regulation. Also it is obvious that the power of appointing and dismissing the gaoler has an intimate relation to the effective regulation of a gaol.

It was contended for the town council that the usage for the corporation to appoint the gaoler had vested the right in that body, although the charter, in clear words, gave it to the mayor, and that the right had passed from the corporation to the town council. But we are of opinion that the usage did not alter the effect of clear words in the charter. It

was contended, further, that the right vested by the local acts in the justices of the borough had passed to the town council by stat. 5 & 6 W. 4, c. 76, s. 116, and stat. 2 & 3 Vict. c. 56, s. 1, the first giving to town councils the powers which were given to justices in Quarter Sessions by stat. 4 G. 4, c. 64, in respect of the boroughs named in schedule (A) of that act, and the second extending to *all borough gaols [*970 in England the provisions of stat. 4 G. 4, c. 64, subject to exceptions not extending to the power of appointing a gaoler. But we are of opinion that stat. 7 W. 4 & 1 Vict. c. 78, ss. 37, 38, had distributed the powers of stat. 4 G. 4, c. 64, to the town council as to building, and to the justices as to regulating, before stat. 2 & 3 Vict. c. 56, came into operation; and that stat. 2 & 3 Vict. c. 56, extends to all borough gaols the powers of stat. 4 G. 4, c. 64, subject, among other modifications, to those introduced by stat. 7 W. 4 & 1 Vict. c. 78, ss. 37, 38; sect. 38 giving the power of appointment to the justices of the borough. It was contended, further, that, as the new prison was a substitute for that to which the justices, by the local acts, appointed the gaoler, stat. 6 & 7 W. 4, c. 105, s. 8, enacting that everything provided by any local acts to be done by the justices, except what relates to the business of a Court of criminal judicature, may be done by the town council, gave that power of appointment to the town council. But we are of opinion that the appointment of a gaoler is within the exception above mentioned, and also, as before stated, that the appointment to the new prison is within stat. 7 W. 4 & 1 Vict. c. 78, s. 38.

On this examination of the statutes, it appears to us that the justices are entitled, and the other claimants are not. And we would add that, if such complicated enactments were doubtful, expediency, in our judgment, supports the construction imposing this duty on the justices of the borough.

The rule for a quo warranto is, therefore, made absolute.

Rule absolute.(*a*)

(*a*) Reported by H. Davison, Esq.

*971] *The QUEEN v. The Inhabitants of MARTON CUM GRAFTON. *July* 7.

An examination in support of a derivative settlement gave the date of the marriage of the pauper's father, but omitted to give the place. The Sessions decided that the omission was immaterial; and this Court, on a case stated, confirmed their decision.

A ground of appeal against an order of removal stated that C., who resided in the respondent parish under a certificate, acquired a settlement therein "by reason of his settling upon, and renting and occupying a tenement of the yearly value of 10*l*.," &c. *Held* that the ground of appeal was insufficient under stat. 9 & 10 W. 3, c. 11.

A case from quarter sessions must not submit a question to this Court on the sufficiency of examinations or grounds of appeal, with a direction that, if the Court should decide in favour of their sufficiency, the case may be sent back to sessions to be reheard on the merits: but the merits should be heard by the sessions in the first instance, so that, if any question then remain for this Court, its decision may be final.

ON appeal against an order of two justices for the removal of John Coates, &c., from the township of Wath, in the North Riding of Yorkshire, to the township of Marton cum Grafton, in the West Riding of the same county, the Sessions confirmed the order, subject to a case. The case set forth the following facts.

The examination of Joseph Coates the pauper's father, after stating that in 1812 he obtained a certificate acknowledging him to be settled in the appellant parish, proceeded thus: "Which certificate I delivered to the overseers of the said township of Wath in the year 1812, when I came to reside in that township; and accordingly from that time to this I have dwelt in the said township of Wath under the said certificate. About the year 1812 I was legally married to my wife Margaret. John Coates of Wath aforesaid, the pauper above named, was one of our children born after our marriage."

The first ground of appeal alleged that the grounds of removal, and the facts and evidence in support of the same, were not set forth with sufficient certainty. The fifteenth ground alleged that in the years 1817, 1818 and 1819, and in each and every of them, Joseph

*972] *Coates "acquired a settlement in your said township of Wath by reason of his settling upon, and renting and occupying, in each and every of those years, a tenement of the yearly value of 10*l*., which said tenement consisted of," &c., "rented by the said Joseph Coates of one William Pearson," &c. The sixteenth ground of appeal, which set up a subsequently acquired settlement of the same kind, became immaterial.

At the trial, the appellants objected that the examination of Joseph Coates did not state where he was married. The Sessions overruled the objection. The respondents, having proved their case, objected to the appellants being permitted to give any evidence in support of their fifteenth ground of appeal, because it contained no statement that J. C. had resided forty days in Wath. The appellants, in answer, contended that such statement of residence was unnecessary because it was con-

tained in the examination, and there was in the said ground of appeal a sufficient reference to the examination to incorporate it for this purpose. The Sessions decided that there was no such sufficient reference; and also that the same ground of appeal was bad for not showing that stat. 9 & 10 W. 3, c. 11, relating to the mode by which only a settlement can be gained by certificated persons, had been complied with; but they granted a case upon both of the above points.

The Sessions confirmed the order, subject to the opinion of the Court.

If the Court should be of opinion that the omission of the place where the marriage was solemnised was a material one, the order was to be quashed: or, if the Court upon this point should be of a contrary opinion, and yet of opinion that the fifteenth ground of appeal was not bad on account of the alleged defects above *stated, the appeal was to be sent back to the Sessions, to be heard on the merits. [*973

The case was argued in Easter term last,(a)

Pashley, in support of the order of Sessions. First: it was unnecessary that the examination should give the place of marriage: marriage itself may be proved by reputation. Besides, the question, whether the examination was sufficiently explicit, was for the Sessions exclusively. Secondly: the fifteenth ground of appeal is clearly bad: it neither contains an allegation of residence nor refers to the examination, which does contain such allegation; nor does it show any other renting of a tenement than would be needed under stat. 13 & 14 Car. 2, c. 12, although by stat. 9 & 10 W. 3, c. 11, a certificated person can gain no settlement unless he "take a lease."

Bliss, contrà. The case for the respondents depended entirely upon the marriage; and they should have given full information respecting it. The time of hiring and service, and the name of the master, must be stated where a settlement by hiring and service is set up; *Rex* v. *The Justices of Derbyshire*, 6 A. & E. 885, *Regina* v. *Bridgewater*, 10 A. & E. 693. For the purpose of enabling the appellants to make due inquiries, it was essential that they should have notice of the place of marriage. Secondly, the fifteenth ground of appeal is good. A lease is not necessary to the gaining a settlement under stat. 9 & 10 W. 3, c. 11; *Rex* v. *Croft*, 3 B. & Ald. 171. The examination contains a complete allegation of residence: it was *therefore unnecessary to repeat such allegation in the ground of appeal. *Regina* v. *North Bovey*, [*974 2 Q. B. 500, and *Regina* v. *Stowford*, 2 Q. B. 526, are not in point; for in those cases neither the examination nor the ground of appeal by itself contained a complete allegation of an essential fact; and a combination of the two instruments could not be resorted to, because there was no sufficient reference from the ground of appeal to the examination.

Lord DENMAN, C. J. We are clearly of opinion that the objection taken to the examination is untenable. As to the objection taken to the ground of appeal, the Sessions have placed us in a difficulty by their

(a) April 28th. Before Lord DENMAN, C. J., PATTESON, WIGHTMAN and ERLE, Js.

The declaration also contained counts for goods bargained and sold, work and labour, money paid, and interest, and on an account stated.

Separate pleas of Non assumpsit were pleaded by the defendants Mouls and Ekin. Issues thereon. The other pleas are not material.

The defendant Hullmandel suffered judgment by default.

The cause was tried, before WIGHTMAN, J., at the Middlesex sittings after Easter term, 1846. It appeared that the defendants were sued as members of the provisional committee of a projected company, called "The Common Road Steam Conveyance Company," for the balance claimed in the declaration. The Company was set on foot in the early part of 1839. A provisional committee was formed, of which Ekin, Hullmandel and *others were active members. At the beginning *978] of November, 1839, the committee gave the plaintiff a verbal order to manufacture the machinery in question. At a meeting of the committee, which the plaintiff attended, on 14th November, 1839, the following resolution was passed: "That Mr. Beale be requested forthwith to proceed with the construction of the boiler and machinery, under the direction of the committee of works, on the terms and conditions following: that Mr. Beale shall be allowed monthly to draw such sum as he may wish, not exceeding the price of the work done and materials supplied for the time being, and that the work be completed, if practicable, by the beginning of February, 1840." A copy of this resolution was sent to the plaintiff shortly afterwards. The plaintiff then commenced the work. At the beginning of the year 1840, defendant Mouls first became a member of the committee. He attended a meeting of the committee on the 7th January in that year, when it was resolved that 200*l.* should be paid to plaintiff on account; and also attended several other subsequent meetings, at which similar payments were voted, and alterations in the machinery were suggested and adopted by the committee. It also appeared that Mouls, as a member of the committee of works, inspected the progress of the work from time to time at the plaintiff's factory, and assisted in making experimental trips with the carriage. The work was completed about June in the same year. Letters from Mouls to the plaintiff, in answer to applications for payment of the balance, were given in evidence. In one of these letters Mouls admitted his liability, and promised payment. The aggregate payments on account *979] amounted to 900*l.*; and *the balance unpaid was 492*l.* The company having refused either to pay this balance or to receive the machinery, this action was brought.

At the close of the plaintiff's case, it was objected that the contract sued upon was entered into before Mouls became a member of the committee, and that he, therefore, could not be liable. The learned Judge was of this opinion, and nonsuited the plaintiff, reserving leave to move to enter a verdict for an amount contingently assessed by the jury, on

such counts (if any) of the declaration as the Court should think maintainable.

Humfrey, in Trinity term, 1846, obtained a rule nisi accordingly.

In Easter term last,(*a*)

Crowder showed cause for Mouls, and *Butt* for Ekin The contract in this case was made on 14th November, 1839. The defendant Mouls was no party to it, and cannot be made liable for its non-performance. *Whitehead* v. *Barron*, 2 M. & Rob. 248, is an express authority that a member of a joint stock company is not liable for the price of goods ordered before he became a member, though they are delivered afterwards. In *Barnett* v. *Lambert*, 15 M. & W. 489, the defendant's liability was not carried back beyond the time when he became a member of the provisional committee; and *Wilson* v. *Lewis*, 2 M. & G. 197, is to the same effect. In *Maudslay* v. *Le Blanc*, 2 Car. & P. 409 *n*, the defendant not only inspected the work, for which he was held liable, while *it was in progress, but was a director at the time the work was ordered. In *Ex parte Peele*, 6 Ves. 602, 604, Lord ELDON says that "slight circumstances might be sufficient, where in the original transaction the party to be bound was not a partner, but at the subsequent time had acquired all the benefits, as if he had been a partner in the original transaction," but it is admitted that the doctrine is otherwise at law. The plaintiff cannot rely on the account stated, for the promise to pay was made by Mouls only. [*980

Humfrey, *Petersdorff* and *H. J. Hodgson*, contrà. It has been assumed, on behalf of the plaintiff, that the question is, whether Mouls can be liable on a contract made by the company before he joined it; whereas the question really is, whether there was not evidence that the contract was made after he joined the Company. Suppose a firm of two partners to order an engine of ten horse power; afterwards a third partner to join, and all three request to have an engine of twenty horse power instead. If the engine-maker assent to that request, the old contract is rescinded, and a new one entered into. The resolution of 14th November was merely a medium of proof, and not the specific contract. Such a resolution is neither an agreement nor a memorandum of an agreement, within the Stamp Act, 55 G. 3, c. 184 (Sched. Part I. *Agreement*); *Vaughton* v. *Brine*, 1 M. & Gr. 359, *Lucas* v. *Beach*, 1 M. & Gr. 417. Lord ELDON, in the passage already cited from *Ex parte Peele*, does not restrict himself to equitable doctrines; for the very next words in his judgment are: "and it would not be unwholesome for a jury to infer largely, that that obligation, clearly *according to conscience, had been given upon an implied authority:" and observations of the same character are made by Lord THURLOW in *Ex parte Jackson*, 1 Ves. jun. 131. Even as to old [*981

(*a*) May 3d. Before Lord DENMAN, C. J., PATTESON, COLERIDGE and WIGHTMAN, Js.

partnership debts, an incoming partner may "become liable for such debts, by expressly assuming them upon a proper consideration, or otherwise dealing with the creditor in such a manner as to create an implied obligation and duty to pay the same in common with the old firm;" Story's Commentaries on the Law of Partnership, § 152. In the present case, the new firm took up the old contract, which was previously only inchoate; or, if it was a complete contract, entered into a new contract in substitution of it. [WIGHTMAN, J. When was the new contract made?] On the 7th January, 1840, when Mouls had become a partner, and a payment on account of the engine was made with his sanction. Until payment by way of earnest, there was no binding contract. It is true that the work was commenced before Mouls became a partner: but the plaintiff might, if he pleased, have repudiated the order, and have given the benefit of the work to any other purchaser. *Helsby* v. *Mears*, 5 B. & C. 504, is in point. There the keeper of a coach office, who was also a part owner in several coaches, made a contract with a tradesman for the carriage of parcels, which the latter was in the habit of sending from that office to his customers; and it was held that this contract was binding upon those who subsequently became partners with the carrier.

Secondly. Independently of the special count, the plaintiff is entitled to recover on his count for goods bargained and sold, within the authority of *Elliott* v. *Pybus*, 10 Bing. 512. *Mucklow* v. *Mangles*, 1 Taunt. 318, is not applicable; for *the chattel in that case was not finished at the time when the question of property arose. The property in the plaintiff's work, indeed, passed portion by portion to the defendants as the instalments for such portions were successively paid: a principle fully established in *Clarke* v. *Spence*, 4 A. & E. 448, and *Woods* v. *Russell*, 5 B. & Ald. 942. *Cur. adv. vult.*

*982]

Lord DENMAN, C. J., now delivered judgment.

This was an action in assumpsit for not accepting or paying for a steam carriage, against the defendants, who were three of the members of a company, or proposed company, called "The Common Road Steam Conveyance Company." The declaration contained a special count, and counts for goods bargained and sold, for work and labour, money paid, and upon an account stated.

It was perfectly clear that the special count was not supported by the evidence. It was founded upon a contract said to have been made by the defendants with the plaintiff, and the terms of which were set out. Such a contract, in its terms, was proved, but made at a time anterior to that when the defendant, Mouls, was shown to have become a member of the Company. In the course of the argument the special count was in effect abandoned; and the question ultimately turned upon the count for goods bargained and sold, under which it was contended that

the plaintiff was at all events entitled to a verdict. But it appears to us that the plaintiff's right to recover upon that count is met by the same objection. The contract for building the steam carriage was made by the plaintiff with a *committee of the Company on 14th November, 1839; and as the work proceeded, alterations were made in its construction from time to time, with the approbation, and sometimes at the suggestion, of members of the committee. In January of the following year, the defendant, Mouls, became a member, and took an active part in trying and making experiments with the carriage, and, upon an application for money by the plaintiff, had on one occasion promised payment. [*983

Under these circumstances it was contended that the three defendants were liable, not upon the original contract of November, 1839, under which the building of the carriage had commenced, and which was the only *express* contract proved, but upon a new contract in January of the following year to *be implied* from the circumstance of Mouls, and the other two defendants who were parties to the original contract, uniting at that time in giving directions about the carriage, and from the subsequent promise of payment by Mouls, who was not a party to the original contract. But we are of opinion that there is no sufficient ground for implying such new contract: only one contract in fact was proved; and there is no evidence that it ever was rescinded by those who were parties to it. The circumstance of Mouls afterwards acquiring an interest in the subject-matter of the contract will not make him a party to that contract; and his promise of payment, as far as his liability is concerned, was without consideration; nor will that promise support the count upon an account stated, as it was the promise of Mouls only. The first time Mouls appeared as a member of the projected Company was on the 7th of January, 1840, when he, with other members of the Company, authorised a payment of 200*l.* to the plaintiff, on account of the *steam carriage then building; and it was said that by this payment the property in the carriage, as far as it was built, passed to the defendants, according to the decision in *Woods* v. *Russell*, 5 B. & Ald. 942. It is not necessary to consider how far that case may be applicable to this, as to the property passing by the payment on account, because we think that if the property did pass it would pass according to the contract under which the payment was made, and to which Mouls was not a party, and that it would not have the effect of vesting the property in him. [*984

The case of *Helsby* v. *Mears*, 5 B. & C. 504, was also relied upon, as showing that a subsequent partner may be bound by a contract made with his partners before he joined them. In that case a contract had been made as to the terms upon which goods should be carried by some of the defendants, partners as carriers, before the incoming partner

joined them; and it was held that, the business being carried on as usual, he was bound by the previous contract. But in that case a new contract arose upon the delivery of each fresh parcel of goods for carriage; and the only question was as to the terms of such new contract; and, nothing more appearing, it was presumed that the new partner agreed to carry upon the same terms as before. This case might have applied if other steam carriages had been ordered after Mouls joined the undertaking, and nothing had been said as to the terms; but it does not apply to the present case.

Upon the whole, therefore, we are of opinion that the nonsuit ought to stand. Rule discharged.(a)

(a) Reported by H. Davison, Esq.

END OF TRINITY VACATION.

AN

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TO

THE PRINCIPAL MATTERS

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The Judge asked the jury whether the defendant had acted bonâ fide, and on their answering in the affirmative, nonsuited the plaintiff for want of notice.

Held, that the jury should have been asked (with reference to section 28, which enacts that persons found offending may be apprehended without warrant "by the owner of the property injured, or his servant, or any person authorised by him") not only, generally, whether the defendant acted bonâ fide, but whether he had a reasonable belief that he was the owner's servant or had his authority. *Kine* v. *Evershed*, 143.

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W. H., seised in fee of a house and land, died in 1798, leaving a widow, and his son J. H. a minor above fourteen years of age. The widow (with whom J. H. lived) continued to occupy the house and land. In 1798, J. H. being still a minor, the widow married the defendant, who continued thenceforward to occupy the house and land. In 1805 J. H. left the premises, but occasionally resided there afterwards for two or three weeks at a time, with defendant and his wife. The wife died in 1841. In 1842 J. H. mortgaged the premises in fee to the lessor of plaintiff for money which was paid to the defendant, defendant himself being present at the execution of the deed and privy to its contents, and receiving the money from J. H.

Held, that, in ejectment by the mortgagee, the jury were warranted in presuming that the defendant occupied as tenant at will to J. H. *Doe dem. Groves* v. *Groves*, 486.

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III. Use of counter affidavits.

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AFFREIGHTMENT.

I. Contract to carry safely: exceptions.

1. Refusal to engraft exceptions of a private nature.

Assumpsit by shipper on a contract of affreightment. Declaration stated that plaintiff had shipped on board defendant's ship, then in the bay of Gibraltar, and bound for London, calling at Cadiz, certain goods to be safely conveyed to London, and there delivered in good order, the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, &c., excepted, the plaintiff paying freight: promise by defendant so to convey and deliver the cargo, saving the above exceptions: breach, that he failed to do so.

Plea, that the ship in the course of her voyage called at Cadiz, and was then within the jurisdiction of the officers of customs there, and of a certain Court of Spain (described in the plea): that, while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, against the will and without the default of the defendant, on a charge of suspicion of their being contraband according to the law of Spain, and were confiscated by a decree of the said Court, upon the charge aforesaid. On demurrer,

Held, that the plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer; and that it did not appear by the plea to have been incurred through any fault of the plaintiff. Judgment for plaintiff. *Spence* v. *Chodwick*, 517.

2. Actus Dei, what not, 517. Antè, 1.
3. Act of the Queen's enemies, what not, 517. Antè, 1.
4. Peril of the seas, what not, 517. Antè, 1.
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Action against for deposit, 691. Company, VII. 1.

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2. Abandonment of order on: Condition as to costs, 356. Abandonment, 1.

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I. Of moneys received by holder of accommodation bill on account of drawer, 266. Bills, IV.
II. Of money by trustee to cestui que trust, 244. Trustee, I.

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I. Without warrant, no arrest, though there is a valid writ, 546. Execution, IV. 1.
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V. As to showing cause of, on face of warrant, 359. Parliament, IV. 2.
VI. Discharge.
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I. Of reversion.
1. On lease not under seal, 135. Landlord and Tenant, VIII.
2. When he may maintain assumpsit for use and occupation, 135. Landlord and Tenant, VIII.

II. Of insolvent debtor, 337. Insolvent, I.
III. Of bankrupt. Bankrupt, II. VII.

ASSIGNMENT.

I. Of goods.
What passes a present interest.

By agreement, reciting (as the fact was) that plaintiff had discounted a bill for S., and that S., in consideration thereof, had deposited with plaintiff, as a collateral security for re-payment, the lease of his house, and had also assigned to him the fixtures as per inventory, S. undertook, if the bill should be dishonoured, to execute a mortgage to plaintiff of the lease (such mortgage to contain the usual power of immediate sale), together with the fixtures as per inventory, such lease and fixtures to be sold by auction or otherwise, and, after repayment of debt and expenses to plaintiff, the balance to be paid over to S. But, if plaintiff should wish to sell the fixtures by auction or otherwise, S. undertook to allow him to do so on the premises, without his being liable to an action of trespass. S. also undertook to pay all arrears of rent and taxes within three months; and, in default of such payment,

authorised plaintiff to sell the lease and fixtures on the premises by auction or otherwise, without previous mortgage, and to pay the proceeds as before stated. S. signed a receipt for 80*l.* as paid for purchase of the fixtures.

S. became bankrupt, having continued in possession of the house and fixtures until that event, and the bill having then three weeks to run. The assignees took possession of the fixtures and sold them.

Held, that plaintiff was entitled to recover the value from them, the agreement having vested in him an immediate interest in the fixtures.

The fixtures were sold by auction for 36*l.*, a fair price on such sale; but, if they had been valued as between outgoing and incoming tenant, they would have been worth 80*l.*

Held, that plaintiff was entitled to damages according to the latter estimate. *Thompson* v. *Pettitt*, 101.

II. Of lease.

Damages on breach of contract, 756. DAMAGES, I. 1.

III. Of reversion, 135. LANDLORD AND TENANT, VIII.

IV. Of perjury, 670. PERJURY, I.

V. Of errors, 652. ERROR, I.

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I. When it lies.

1. By assignee of contract, 135. LANDLORD AND TENANT, VIII.
2. For use and occupation: brought by assignee of reversion, 135. LANDLORD AND TENANT, VIII.
3. For money paid: costs of defending action at request, 679. BILLS, II. 4.
4. See also ACTION.

II. When it does not lie.

To recover excess levied under regular judgment, 152. EXECUTION, VII. 1.

ATTORNEY.

I. Admission in one of the superior courts.

Rights and privileges in other courts, 940. Post, II. 1.

II. His practice.

1. In what courts he may carry on proceedings.

An attorney admitted in one of the superior courts may (since stat. 6 & 7 Vict. c. 73) maintain an action for his costs in proceedings carried on in another court in which he is not admitted, in the name of attorneys of the latter. *Hulls* v. *Lea*, 940.

2. Covenant in restraint of practice, 346. CONTRACT, VI. 2.
3. Practising in the name of another attorney, 940. Antè, 1.

III. Retainer.

By resolution of town council.

Where a town council had removed a town-clerk from his office, by resolution, for misconduct, and refused his claim of compensation: *Held*, that the costs of an attorney employed in opposing a mandamus to assess compensation were properly chargeable to the borough fund, under stat. 5 & 6 W. 4, c. 76, s. 92, although the jury found the issues ultimately raised on the mandamus for the late town-clerk: it not being shown that the town council acted otherwise than bonâ fide in the removal.

The attorney having been retained generally by a resolution of the town council, and having also been authorised and retained by resolution of the town council to take proceedings in opposition to the rule nisi for the mandamus: *Held*, that this was a sufficient retainer to warrant the payment to him of the costs of defending the issues.

And that it was no objection to the order for payment made in consequence, that it was an order for payment on account, the attorney not having delivered a bill, and it not appearing that the sum ordered to be paid exceeded the sum due to the attorney. *Regina* v. *Lichfield Town Council*, 534.

IV. Of party: legal restrictions.

Swearing affidavits before partner, 232. CONUSANCE, I. 1.

V. Acts affecting his personal liability.

Acting as servant, 143. ACTION, V.

VI. Liability to client: case for negligence.

In omitting to return writs to save Statute of Limitations.

Declaration stated that plaintiff employed defendant as attorney to sue H. for the recovery of a sum of money; and thereupon it was the duty of defendant to use proper care in conducting the suit: yet defendant did not use proper care, in this, that, having, as such attorney, sued out writs for the recovery of the said money and for the purpose of saving the Statute of Limitations, he did not, upon H. not being found so as to be served with such writs, "duly file" the said writs with the proper officer, according to the necessary and accustomed practice of the Court of Queen's Bench; whereby the action was barred by the statute. Verdict for plaintiff, on Not Guilty.

Held,

1. Under stat. 2 & 3 W. 4, c, 39, s. 10, which enacts that, to save the Statute of Limitations, every writ issued in continuation of a preceding writ shall be "returned non est inventus, and entered of record" within one month after its expiration: That, although the statute 2 & 3 W. 4 did not in terms require such writs to be "filed," yet the word "file," in the declaration, might

have the sense of bringing the writs to the office, and in that sense would be included in the word "returned" in the statute, and such filing would therefore be a necessary part of the practice in saving the Statute of Limitations, and a part of the attorney's duty. And that the Judge was right in so directing the jury.

2. That the question of negligence, in not complying with the practice of the Court, was a question of fact for the jury, under the Judge's direction as to the law.

3. That there was no ground for arresting the judgment, as, if there could be any sense of the word "file," in which it was defendant's duty to file the writs, the declaration was good after verdict.

The judgment on this last point was affirmed on error by the Court of Exchequer Chamber. (Page 83, post.)

4. *Held* also, in the Court of Error, on objection that the declaration showed no retainer for the purpose of keeping the action alive, and, consequently, no duty to do so: That there were, in the allegations above stated, a duty sufficiently shown, and a breach well assigned. *Hunter* v. *Caldwell*, 69.

VII. Liability to other parties.
1. Case against for excessive levy: when done scienter, 152, 172. EXECUTION, VII. 1. 2.
2. Where he acts without authority, 143. ACTION, V.

VIII. Delivery of signed bill.
1. Omission merely prevents recovery by action.

To assumpsit on an attorney's bill of costs, defendant pleaded a set-off, and, in support of that plea, put in an account furnished to him by plaintiff. Plaintiff's credit side of the account contained his claim for costs, but of this no signed bill had been delivered, and defendant therefore contended that the debit side only of plaintiff's account could be looked to:

Held, that the whole account was evidence for the jury, as the non-delivery of a signed bill does not bar the debt, but merely (if insisted on) prevents its recovery by action. *Hamilton* v. *Turner*, 482.

2. Payments on account before, 534. Antè, III.

IX. Remedies for bill.
1. Set-off in action by client, 482. Antè, VIII. 1.
2. By taking credit in account, 482. Antè, VIII. 1.
3. Payments to, on account, 534. Antè, III.
4. For business in court where not admitted, 940. Antè, II. 1.

X. Libel on, 899. DEFAMATION, II.

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I. Special statutory.
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II. Inferred from regularity of proceeding in the performance of a duty, 812. POOR, XXVI.

III. From owner to arrest trespasser, 143. ACTION, V.

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I. Bound, 546, 552. EXECUTION, IV. 1. II. See also SHERIFF.

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BANKRUPT.

I. Act of bankruptcy: when dependent on the time within which a fiat is issued.
1. *Semble*, not where the fiat is afterwards annulled. *Ellis* v. *Russell*, 952, 954.
2. *Semble*, not where fiat issued after the time in continuation of a fiat issued within time but annulled. *Ellis* v. *Russell*, 952, 954.

II. Act of bankruptcy: compounding with petitioning creditor to former fiat.
Who may be the petitioning creditor to the subsequent fiat.

Defendants, on whose petition a fiat in bankruptcy had issued, received a payment from the bankrupt, whereby they obtained more in the pound than his other creditors. The fiat, not having been proceeded in, was annulled; and another fiat issued on the petition of a creditor whose debt was due before the payment made to defendants.

Held: That this payment was an act of bankruptcy within stat. 6 G. 4, c. 16, s. 8, on which the last fiat was sustainable, and that, as no person had been appointed by the Commissioners, under that section, to whom the money paid was to be returned by defendants, the assignees of the bankrupt were entitled to recover it. *Ellis* v. *Russell*, 952.

III. Petitioning creditor's debt. When it must have been due, 952. Antè, II.

IV. Composition with petitioning creditor.
1. An act of bankruptcy, 952. Antè, II.
2. Assignees under subsequent fiat may recover the amount by action, when, 952. Antè, II.

V. Fraudulent preference.
Of petitioning creditor to former fiat, 952. Antè, II.

VI. Goods in bankrupt's order and disposition.
What are not, 101. ASSIGNMENT, I.
VII. Damages against assignees.
For wrongful sale of goods under unfavourable circumstances, 101. ASSIGNMENT, I.
VIII. Uncertificated: earnings of.
For personal labour, 337. INSOLVENT, I.
IX. Notice of bankruptcy of parties to bills and notes, 704. BILLS, VI. 1.

BAR.

Of debt, 482. ATTORNEY, VIII.

BARON AND FEME.

Money settled to separate use of feme.
I. Trustee's right to require receipt, 244. TRUSTEE, I.
II. What not an appropriation of dividends, 244. TRUSTEE, I.

BASTARDY.

I. Proceeding by order.
1. Form: showing proceedings in presence of party.

An order in bastardy commencing "whereas S." (the putative father) "having been duly served with the said summons," &c., "*and now appearing* in pursuance thereof, proceeded as follows:

"And, it being now proved to us, in the presence," &c., "of *the attorney attending on behalf of* S." (that the child was born a bastard, &c.): "and we having, in the presence, &c. "*of the said attorney*," &c., "heard the evidence of" (the mother), "and no evidence having been tendered on behalf" of S.: It then adjudged S. to be the putative father:

Held sufficient, since stat. 8 & 9 Vict. c. 10.

Held, also, that the form of order given in the schedule to that act does not require it to be set out that the evidence was given on oath. *Regina* v. *Shipperbottom*, 514.

2. Following statutory form, 514. Antè, 1.
3. Abandonment of order, when ineffectual, 356. ABANDONMENT, I.
II. Bond: stamp.
What stamp sufficient.

To a declaration on a bastardy bond in 100*l*., conditioned to indemnify the parish against expenses of maintenance, from time to time, of an expected bastard child: breach, that defendant had suffered and permitted the child to be maintained at the expense of the parish; the defendant pleaded that the child was past the age of nineteen, and was under the control of the parish officers; that he, defendant, was able and willing to provide for the child without the assistance of the parish, and requested the parish officers to deliver the child over to his care and management, which they refused to do, and thereby the child had been provided for by the parish officers voluntarily and of their own wrong. *Held*, after verdict, that the plea contained an answer to the action, though it did not aver that the child was willing to go to the putative father.

Held, also, that such bond required a stamp of 1*l*. 15*s*. as being a Bond "not otherwise charged," under stat. 55 G. 3, c. 184, Sched. Part. I. *Bond;* and not 25*l*., as a bond to secure the repayment of money to be advanced, &c., or which might become due on an account current, and to an amount "uncertain and without any limit." *Bowes* v. *Marsh*, 787.

III. Bond: excuse of breach.
Refusal of parish officers to let the obligor maintain the child, 787. Antè, II.
IV. Bond: pleading.
Plea in excuse of breach: what good after verdict, 787. Antè, II.
V. Nature of the relation between father and child.
1. Readiness of the father to maintain the child, 787. Antè, II.
2. Willingness of the child to live with the father, 787. Antè, II.

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I. Nature and amount of.
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BILL (ATTORNEY'S).

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Expenses of, 15. EXECUTION, III. 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Promissory notes: what negotiable within the statute.
Notes to maker's own order.

Stat. 3 & 4 Ann. c. 9, s. 1, extends to a promissory note payable to the maker's own order, so as to make him liable upon the note to an indorsee. *Wood* v. *Mytton*, 805.

II. Accommodation bill.
1. Satisfaction by drawer, 266. Post, IV.
2. When holder may not reduce moneys received on account of drawer in satisfaction by setting off other demands, 266. Post, IV.
3. Pleading: absence of consideration, and payment, 479. Post, IX.
4. When accommodation acceptor may re

cover costs of unsuccessfully defending action on the bill.

Plaintiff having accepted a bill for defendant's accommodation, defended an action brought by the indorsee, and finally paid the amount with the costs of the action. Plaintiff brought assumpsit for money paid: the jury were directed that, if defendant requested plaintiff to undertake the defence (as to which there was some evidence, but no express request proved) the costs were recoverable as money paid to the plaintiff's use. Verdict for plaintiff.

Held, that the direction was right, and the costs recoverable under the count for money paid. *Garrard* v. *Cottrell*, 679.

III. Presentment for payment.

Excuse for nonpresentment: insolvency, 704. Post, VI. 1.

IV. Payment.

By appropriation of moneys received by holder on account of drawer of accommodation bill.

To a declaration in assumpsit by payees against acceptors of a bill for 419*l*. 2*s*., alleging non-payment to plaintiff's damage of 500*l*., defendants pleaded:

1. As to 4*l*. 18*s*., parcel, &c., payment of 5*l*. into Court, which plaintiffs accepted.

2. As to the residue of the sum in the declaration mentioned: That plaintiffs, as brokers, had sold property for one H. for a sum exceeding the said residue, viz. for 415*l*. 12*s*. 6*d*., to be paid to plaintiffs, as H.'s agents, on a future day: that, after the sale, H. asked plaintiffs to advance him the 415*l*. 12*s*. 6*d*., and they agreed to do so if H. would procure defendants to accept a bill drawn upon them by plaintiffs for 419*l*. 2*s*., and plaintiffs agreed and promised defendants and H., that plaintiffs would appropriate the purchase money, when received by them, towards payment of the bill, if defendants should accept: That defendants, confiding, &c., did, for the accommodation of H., and without any consideration, accept the bill declared upon; and plaintiffs thereupon advanced the 415*l*. 12*s*. 6*d*.: And that the purchase money, to that amount, afterwards and before the bill was due, became payable, and was received by plaintiffs as brokers for H., and is in their possession, to be appropriated, &c., and was sufficient to pay the residue and all damages by non-performance of the promise in the declaration mentioned. Replication, De injuriâ: issue thereon.

3. As to the said residue, &c.: payment by defendants to plaintiffs, before the bill became due, of a sum exceeding such residue, viz. 415*l*. 12*s*. 6*d*., and acceptance thereof by plaintiffs, in full satisfaction of the promises, &c., as to the residue, and of all damages by the nonperformance thereof as respects such residue, &c. Replication denying the payment and acceptance: issue thereon.

The facts, as stated in plea 2, having been proved at the trial (when it appeared that the 415*l*. 12*s*. 6*d*. was the price of railway shares sold for H., and that the bill was drawn for 419*l*. 2*s*. to cover interest accruing between the settling day for the shares, and the maturity of the bill:

Held that the second plea showed a good defence; and that the receipt by plaintiffs of the 415*l*. 12*s*. 6*d*., under the agreement, was, as alleged in the third plea, a payment by defendants to plaintiffs.

And that plaintiffs should not set up against defendants, in reduction of such payment, a charge for brokerage on the purchase of the same shares, which H. had agreed to pay plaintiffs if the shares sold for 415*l*. 12*s*. 6*d*.

Held also, on motion for judgment non obstante veredicto on the second and third pleas, because they gave no answer as to the damages: That the "residue" mentioned in those pleas might be taken to mean the amount of the bill, minus the sum paid into Court, and with the addition of such damages as the jury might give, not exceeding 500*l*. And, therefore, that the payments alleged and proved might be considered, after verdict as covering the whole demand to which they were pleaded. *Hills* v. *Mesnard*, 266.

V. Arrangements in the nature of payment.

Agreement to appropriate moneys when received, 266. Antè, IV.

VI. Payment of debt by transfer of.

1. Notice to the transferor of the insolvency of the parties to the instrument.

To a declaration for goods sold, the defendant pleaded that he transferred to plaintiff promissory notes made by L. and Co., &c., which plaintiff accepted on account of the debt, and that plaintiff did not, within a reasonable time, present them. Replication, that, on the day before the transfer, and without the knowledge of plaintiff, L. and Co. "became and were bankrupts and insolvent," and that they "continued such bankrupts," &c., and unable to pay the notes: that afterwards, and before a reasonable time for presentment, plaintiff discovered the bankruptcy, and that, within a reasonable time after such discovery, &c., he gave defendant notice of the premises, and offered to return the notes: rejoinder, that plaintiff did not give the notice till after the expiration of a reasonable time for presenting the notes for payment. Demurrer.

Held that plaintiff was only bound to give such notice within a reasonable time after he acquired the knowledge, and not, necessarily, before the expiration of time for presentment. Judgment for plaintiff. *Robson* v. *Oliver*, 704.

2. Presentment for payment, when and how far necessary, 704. Antè, I.

VII. Checks: delivery.

Through intermediate agent.

Defendant, wanting money, desired T., a discount agent, to procure him 160*l*. on discount. T. asked for security: and defendant gave T. his check for 160*l*., payable to T. or bearer, saying that T. must get him the money "by hook or by crook." T. then said he would see a friend, and try to get defendant the money; and he afterwards obtained the money from plaintiff, handed him the check, paid over the money to defendant, and at the same time received 15*l*. from defendant for discount, of which he kept 7*l*. and paid 8*l*. to plaintiff. Defendant afterwards requested time for payment of the check; and T., without referring to the plaintiff, gave time. Defendant, requiring still further delay, wrote to T., "tell your friend I want his money till Christmas, and am willing to pay for the accommodation. Let me know what he will do for me." During these transactions, T. did not mention any lender by name to the defendant.

In an action of debt on the check, averring delivery of it to plaintiff; plea, that defendant delivered the check to T., that, save as aforesaid, there never was any delivery of it by defendant: and that T. delivered it to plaintiff; without this, that defendant delivered it to plaintiff in manner, &c.: issue thereon:

Held that, on the above evidence, a jury was warranted in finding a delivery of the check by defendant to plaintiff. *Samuel* v. *Green*, 262.

VIII. Form of action.

1. Debt by holder of check, 262. Antè, VII.

2. To recover costs of defending action at request of party accommodated, 679. Antè, II. 4.

IX. Pleading.

Duplicity: payment and absence of consideration.

Assumpsit against acceptor of a bill of exchange, indorsed by drawer to plaintiff.

Plea, that defendant accepted for the accommodation of the drawer, and that there never was any value or consideration for defendant's acceptance, or for the payment of the bill by him; that, after the bill became due, and before action, the drawer paid plaintiff the amount; and that plaintiff always held, and still holds, the bill without value or consideration.

Replication, that the bill was not accepted for the drawer's accommodation, and that the drawer did not pay the amount of the bill, modo et formâ.

A demurrer to the replication for duplicity was set aside as frivolous by a Judge's order.

Held, on motion to rescind the order, that the plea was itself double, and the replication therefore not objectionable for duplicity.

Held, also, that the jurisdiction of a Judge at chambers in setting aside demurrers as frivolous is of so beneficial a tendency that the Court will not encourage applications calling on them to interfere with it. *Lees* v. *Ridley*, 479.

X. Costs.

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Belief of authority, 143. ACTION, V.

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MUNICIPAL CORPORATION.

BOROUGH RATE.

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Mode of rating, 178. POOR, XII. 1.

CAMBRIDGE.

University, 292. CONUSANCE, I. 1.

CALLS.

Action for.

Infancy when no defence.

To a declaration in debt for calls, charging defendant as the holder of shares under a railway act incorporating stat. 8 & 9 Vict. c. 16, it is no answer to plead that defendant, when he became indebted, was an infant; or that defendant is sued as the registered holder of shares, that when he became so registered he was an infant, and that he has not, since he attained his age, been registered anew, or ratified the original registration, or held the shares except as such registered holder as before mentioned.

For (per Lord DENMAN, C. J., and PATTESON, J.) by the express wording of stat. 8 & 9 Vict. c. 16, an infant is liable for calls. At

all events (per COLERIDGE and ERLE, Js.), if he is sued after obtaining his age and still holds the shares; for such holding is a ratification. *Cork and Bandon Railway Company* v. *Cazenove*, 935.

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3. For issuing execution for full amount on judgment partly satisfied, 152, 172. EXECUTION, VII. 1, 2.

II. For negligent conduct.
1. Against sheriff, 546. EXECUTION, IV. 1.
2. Against attorney, 69. ATTORNEY, VI.

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Stating on face of warrant, 359, 433, 454. PARLIAMENT, IV. 1.

CENTRAL CRIMINAL COURT.

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Plaintiff was summoned before two justices for refusing to pay a sum under 10*l*., being his proportion of a church rate, laid by the churchwardens with the consent of the minority of a vestry meeting, but refused by the majority. The justices asked his attorney if he had anything to say against the payment. The attorney said, that he should not try the validity of the rate before the justices, but give them a written notice; and should bring an action against the justices if they enforced the rate. He then, before the making of the order, served the justices with a written notice that the plaintiff protested against the church rate as unscriptural, &c.; that he should not contest the validity of the rate in the ecclesiastical courts; and that he should commence actions in the courts of common law against the justices and all other persons concerned therein for all acts and proceedings connected with the rate which he should be advised were illegal. The justices made an order for payment, knowing, at the time, that the plaintiff intended to dispute the right of a minority to impose a church rate.

Held, that these facts, taken together showed that the validity of the rate was disputed, and notice thereof given to the justices, under stat. 53 G. 3, c. 127, s. 7. And

the justices having made a warrant founded on the order, under which warrant plaintiff's goods were distrained, plaintiff recovered replevin. *Dale* v. *Pollard*, 504.

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CLERGY.

I. Sequestration on nonresidence.

The three months how to be calculated.

To avowry by a rector for cattle taken as a distress for arrears of a rentcharge in lieu of tithe on land of which the plaintiff was tenant, plaintiff pleaded in bar, that the bishop of the diocese had under stat. 1 & 2 Vict. c. 106, (s. 75), appointed a curate to perform the duties of the rectory at a stipend: that the defendant was, at that time, absent from the rectory, and had not resided thereon for nine months in the year next preceding, *to wit*, *the year commencing on the 20th March*, 1842, but had, for a period exceeding three months, to wit, &c., *in the course of the year aforesaid*, absented himself, &c.: that the curate complained to the bishop of non-payment of the stipend, whereupon the bishop summoned defendant, and, on his non-appearance determined summarily, and adjudged 75*l*. to be due: that, defendant not paying, the bishop issued a monition, requiring him to pay, in default of which a sequestration would issue; that defendant was served with the monition, but did not pay: and the bishop thereupon issued a sequestration, under the seal of his consistorial court, empowering a sequestrator whom the bishop appointed, to levy the 75*l*. on the profits, rentcharges, &c., of the rectory; and that the sum now distrained for was demanded of plaintiff by the sequestrator, and paid by plaintiff to prevent his distraining. On demurrer to the plea,

Held, that the above proceedings to sequestration, under stat. 1 & 2 Vict. c. 106, s. 83, were not authorised by the statute, because the power to appoint a stipendiary curate is given, by sect. 75, only when an incumbent, under the circumstances there described, is absent *for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year*: and, by sect. 120, the year is to be reckoned *from* 1*st January to* 31*st December*.

And, therefore, that, for want of jurisdiction in the bishop to sequester, the payment under such sequestration did not discharge the plaintiff. *Sharpe* v. *Bluck*, 280.

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COMMITTEE.

Of public company.

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COMMITMENT.

I. Under statutory power.

Necessity of summons to show cause.

Under stat. 8 & 9 Vict. c. 127, s. 1, which enacts that a debtor, against whom a judgment of debt has been obtained, may be summoned before any one of certain inferior courts, and that, if he appears to have the means of paying by instalments, and shall not pay at such times as the Court shall order, the judge may order him to be committed for any time not exceeding forty days:

Held, by Lord DENMAN, C. J., and ERLE, J., that, on default in paying an instalment, the debtor may be committed at once, without summons to show cause.

By PATTESON and COLERIDGE, Js., that such previous summons is necessary.

By stat. 8 & 9 Vict. c. 127, s. 1, a debtor, against whom judgment has been obtained, may be summoned before the inferior court within the jurisdiction of which he shall reside or be, and, if he appear to have the means of paying, and shall not pay, his debt at the time ordered by the Court, he may be committed to the gaol of the district in which he "shall be resident."

Held, by Lord DENMAN, C. J., COLERIDGE and ERLE, Js., that the commitment must be to the gaol of the district in which the debtor resided at the time when he was summoned.

By PATTESON, J., that the commitment must be to the gaol of the district in which he resides at the time of commitment.

A warrant of commitment under stat. 8 & 9 Vict. c. 127, s. 1, recited that K. of "Fleet Lane, Farringdon Street, in the city of London," and "then being at Fleet Lane in the city aforesaid," had been summoned touching the non-payment of a debt for which

judgment had been previously recovered against him, and, on appearance, had been ordered to pay by instalments, and had made default in so paying; the warrant then ordered his commitment to a gaol of the city of London, being the city in which "the said" K. "hath been resident."

Held, by Lord DENMAN, C. J., and ERLE, J., and *semble*, per COLERIDGE, J., that it appeared from the warrant that the debtor was resident in the city of London at the time of commitment.

Held, by PATTESON, J., that it did not so appear. *Kinning's case*, 730.

II. Warrant.

Place of residence how shown in, 730. Antè, I.

III. Nature of.

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IV. Cause of.

For not paying instalment, ordered by small debts' court, 730. Antè, I.

V. Place of.

To the prison of the district where the debtor "shall be resident," 730. Antè, I.

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I. Pur cause de vicinage: nature of the right.

1. What it is, 604, 620, 632, 636. Post, II. III.

2. The number of owners that may prescribe, 620. 633. Post, III.

II. Pur cause de vicinage: between what parties the right may exist, and how.

1. May exist by custom between adjoining commons.

To avowry for damage feasant on a common, D., common pur cause de vicinage is well pleaded in bar by alleging immemorial common pur cause de vicinage between commons P. and D., for cattle duly put on said commons, and that plaintiff has, for thirty (or sixty) years had right of common on P.

Reputation may be given in evidence in support of the immemorial right of common pur cause de vicinage so pleaded. *Prichard* v. *Powell*, 589.

2. Cannot exist by custom between private estates.

A claim of common pur cause de vicinage pleaded in respect of a private estate, and alleging such common to exist by custom, is bad. And, therefore, a right to such common is not shown by alleging that the farm of A. and the farm of B. were, and from time whereof, &c., had been, contiguous to each other, and not separated by any fence, and that the sheep, from time to time put on the land of A. to feed, "from time immemorial, have gone, escaped," &c., "and have been used and accustomed to go," &c., therefrom into the land of B., and to intermix there and to feed with sheep from time to time feeding on B.'s land; and in like manner, &c.; alleging in similar form that the sheep put on B.'s land have gone, &c., therefrom, and been used to go, &c., upon the land of A., and to intermix, &c. And this objection to a replication was held good on demurrer to the rejoinder. *Jones* v. *Robin*, 581.

3. Cannot exist by custom between private estates.

Semble, by the Court of Exchequer Chamber, that common pur cause de vicinage may exist between two neighbouring proprietors, though there be no other right of common over the lands, on either side, from which the cattle escape.

Held, by the same Court (affirming the judgment of the Queen's Bench), that a plea, claiming common pur cause de vicinage in respect of a private estate over which no other right of common is shown, and alleging such common to exist by custom, is bad. And that a plea of such common, against the owner of the land into which the cattle escape, must be a plea of grant or prescription.

And, therefore, that a claim of such common, merely alleging that the land of A. and the land of B. were, and from time whereof, &c., had been contiguous to each other, and not separated by any fence, and that the sheep from time to time duly put on the land of A. to feed "from time immemorial have gone, escaped," &c., "and have been used and accustomed to go," &c., therefrom into the land of B., "and to intermix there and to feed with sheep from time to time feeding on" B.'s land; and in like manner, &c.; alleging in similar form that the sheep duly put on B.'s land have gone therefrom and been used, &c., upon the land of A., and to intermix, &c.; is ill pleaded: the objection being taken to the replication, on demurrer to the rejoinder. *Jones* v. *Robin*, 620.

4. Semble not between a close and a common, 604. Post, III.

5. Whether it may exist by prescription between private estates, 581, 587, 620. Antè, 2, 3.

6. Between private lands: though no other right of common, 620. Antè, 3.

III. Pur cause de vicinage: what usage necessary.

Not established where the stray cattle have always been turned back.

To establish a common pur cause de vicinage, an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed.

Semble, that a plea is bad, after verdict, which professes to show a common pur cause de vicinage, by usage, between the "close" of an individual and a waste or common.

Admitted, that, where there is a common pur cause de vicinage between two wastes, and one of them is, under a private act of parliament, conveyed to allottees for the purpose of being inclosed, and the commissioners under the act extinguish all rights of common on such one waste, these proceedings do not, of themselves, put an end to the common pur cause de vicinage. *Clarke* v. *Tinker*, 604.

IV. Pur cause de vicinage: commoner's title.
What title to depasture on the commoner's own common sufficient, 589. Antè, II. 1.

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Not extinguished by inclosure award extinguishing rights of common, 604. Antè, III.

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COMPANY.

FIRSTLY: Public companies.

I. Name.
Registered company cannot change its name.

A joint-stock company completely registered under stat. 7 & 8 Vict. c. 110, and thereby "incorporated" by virtue of sect. 25, has no power after such incorporation to change its name. And the registrar of joint-stock companies, having refused to receive a return of such change of name, produced under sect. 10, was held, on motion for a mandamus, to have done rightly. *Regina* v. *Registrar of Joint Stock Companies*, 839.

II. Constitution.
What changes a registered company may not make, 839. Antè, I.

III. Registration.
Of changes after incorporation, 839. Antè, I.

IV. Provisional committee.
1. As distinguished from committee of management, 691. Post. VII. 1.
2 Effect of change in the body, 691. Post, VII. 1.

V. Provisional committee: liability to actions.
1. On contracts entered into before defendant became a member.

Assumpsit. The declaration contained a count for not accepting or paying for machinery made for defendants, according to a special contract, and also a count for goods bargained and sold. Defendants were members of a provisional committee of a company, which had entered into a written contract for the machinery before M., one of the defendants, joined the committee. Under this contract plaintiff was to have monthly payments on account of the work while in progress, not exceeding the price of the work done and materials supplied for the time being. After M. joined the committee, several payments were made on account of the work, and alterations suggested and adopted, with his sanction; and he also took an active part in superintending the work and making experiments with it.

Held: 1. That there was no ground for implying a new contract after M. joined the committee; and that his acquiring an interest in the subject matter of the contract previously entered into would not make him liable on such contract.

2. That he was not liable on the count for goods bargained and sold, because, if the property in successive portions of the machinery, while the work was in progress, did pass from time to time by the payments on account, it passed according to the terms of the special contract, to which he was not a party. *Beale* v. *Mouls*, 976.

2. Effect of new members joining in directions, 976. Antè, 1.
3. Effect of new member promising to pay, 976. Antè, 1.

VI. Committee of management.
When not the contracting party, 691. Post, VII. 1.

VII. Allotment of shares.
1. With whom the allottee contracts.

The prospectus of an intended railway company contained a list of "Provisional directors," and announced that applications for shares were to be made to "the Provisional Committee of Management." A committee of management, with a chairman, was subsequently appointed by a resolution of the provisional committee, and thenceforward managed the affairs of the company. Defendant made an application for shares in the form prescribed, which contained a promise to pay deposits, and received a letter of allotment from the secretary of the company, stating that scrip certificates would be delivered in exchange for such letter. At the foot of the letter was a receipt for deposits signed by one of the company's bankers. The form of the receipt purported that the amount payable on deposits had been received "on account of the provisional committee."

Held, that the defendant's contract to pay the deposits was made with the provisional committee at large, and that the committee of management could not maintain an action for the non-payment.

Some of the provisional directors having withdrawn, and other persons having become such directors, between the application for shares and the allotment: *Quære*, whether defendant had the option of taking or refusing the shares allotted. *Woolmer* v. *Toby*, 691.

2. Effect of change in body of provisional directors, 691. Antè, 1.

3. Delay and change of circumstances, 691. Antè, 1.

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X. Shareholders: registration.

Infants, 935. CALLS.

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1. When and how far the infant is liable, 935. CALLS.
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V. Illegality.
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VI. Restraint of trade.
1. When good though unlimited in point of time.

An agreement to give up a house and good-will of a business for 7*l.*, and not to open a shop in the same line of business within one mile of the said house under a forfeiture of 20*l.*, is not illegal on the ground that the restraint of trade is unlimited in point of time and may continue though the purchaser ceases to carry on the business.

Nor does the agreement require a stamp as being for a subject-matter of the value of 20*l.* *Pemberton* v. *Vaughan*, 87.

2. Separation of the part which is good.

A deed recited that plaintiff had carried on the business of an attorney, that defendant had for four years been his salaried clerk, and had applied to him to accept defendant as his articled clerk without premium, which plaintiff consented to do on defendant's entering into the covenants thereinafter contained; and defendant bound himself clerk to plaintiff for five years by articles: It was then, by the deed, witnessed that, in pursuance of the agreement, and in consideration of 5*s.*, &c., defendant did, for himself, his heirs, executors and administrators, thereby covenant with plaintiff, his executors, administrators, partners and assigns: That defendant should not, during the term of five years mentioned in the articles, nor at any time after its expiration, directly or indirectly, interfere or intermeddle with, or be concerned as attorney, agent or otherwise, for, any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business of or with plaintiff, or any partner or partners he might admit to a share with him or any person to whom he might sell or assign the whole or any part of his business of attorney; and that defendant should not act as partner, clerk or assistant with or to any person who should interfere or intermeddle as aforesaid; and, in case defendant should commit any breach of his said covenants, he should forfeit and pay, as liquidated damages,

100*l.* for every such breach; and each day's repetition or continuance of any interference, &c., as aforesaid should be deemed a fresh breach of covenant, and incur a new and separate penalty and right of action.

Plaintiff declared in covenant, assigning breaches in respect of persons who had been his clients before and at the time of the making of the deed, and of persons who had been his clients while defendant continued under the articles.

Held, that the part of the covenant in respect of which the breaches were assigned was good, as not operating unduly in restriction of trade, and might be separated from the rest; and therefore an action might be brought on such breaches. *Nicholls* v. *Stretton*, 346.

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CONUSANCE.

I. Claim of: affidavits.
1. Answer by counter-affidavits.

It is not an invariable rule (if there be a rule) that the affidavit annexed to a claim of conusance shall not be answered by counter-affidavits.

And, where the University of Cambridge claimed conusance in the case of A., B. and C., alleged in the claim to have been summoned "in an action of trespass at the suit of D., against the form of the privilege" of that university, and the affidavit stated that B. and C. were common servants of the university, called proctors' men, and that the supposed trespass was an act done by them in discharge of their duty, in obedience to the order of A., a pro-proctor of the University:

Held, that an affidavit might be received in answer, showing that B. and C. were constables appointed under stat. 6 G. 4, c. 97, and therefore, by sect. 1 of that act, liable to be sued at common law, notwithstanding any privilege of the University.

And that such affidavit, alleging that B. and C., at the time, &c., "were constables in and for the University, appointed and acting under and by virtue of" the above statute, "and that this action is brought against them for and in respect of acts done by them in execution of their said office," without further detail, were a sufficient answer to the claim, as to B., and C.

Quære, whether the claim could be well made without showing if the fact were so, that B. and C. were not such constables as the statute excludes from privilege.

Quære, whether claim of conusance can be allowed as to one party for whom it is

made, when refused as to others, his co-defendants in trespass.

The University employed, in making the claim, T., an attorney, who had been appointed attorney and solicitor to the University by the Heads of Houses. M., another attorney, was in general partnership with T., but was not attorney or solicitor to the University, and had taken no part in making the claim of conusance: it did not appear whether or not he had any share in the profits of that proceeding. M. and T. had not, jointly or severally, been concerned in the cause of which conusance was claimed. *Held* no objection to affidavits in support of the claim, that they were sworn before M., who was a commissioner. *Turner* v. *Bates*, 292.

2. Whether exceptions ought to be negatived, 292. Antè, 1.

3. Before whom sworn, 292. Antè, 1.

II. Where there are several claimants.

Whether it can be allowed as to one when refused as to others, 292. Antè, I. 1.

III. Who not entitled to the privilege.

Constables under stat. 6 G. 4, c. 97. Antè, I. 1.

CONVICTION.

I. Amendment.

Return to justices for that purpose refused.

A conviction under the Merchant Seaman's Act having taken place in September, and having been returned to the following sessions, a certiorari was obtained to remove it; a rule for a concilium granted in November; and the points delivered in January, disclosing an objection, that the evidence was not set out. The Court, in its discretion, refused to allow the conviction to be taken off the file and returned to the justices that they might amend it, by inserting the evidence.

Semble, that a certiorari to remove a conviction "for certain trespasses and contempts against the form of the statute," &c., is sufficient to bring up a conviction for harbouring seamen, being a single offence under the statute:

But, the justices having returned the conviction to the quarter sessions, and the sessions to this Court, held that, at all events, the certiorari could not then be quashed on the ground of this variance; or, because it improperly described the justices as "assigned to hear and determine divers felonies," they being borough justices only. *Regina* v. *Turk*, 540.

II. Form.

Omission to set out evidence, 540. Antè, I.

III. Removal by certiorari.

1. How described in writ, 540. Antè, I.

2. Return on insufficient description cures the insufficiency, 540. Antè, I.

IV. In particular instances.

Under Merchant Seaman's Act, 540. Antè, I.

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Rights as to, when found in tin mine worked by a bounder, 26, 56. Custom, II. 1.

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I. Evidence of manor, and of lands being in it, 135. Landlord and Tenant, VIII.

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CORPORATION.

I. Municipal. Municipal Corporation.

II. Name.

When it cannot change, 839. Company, I.

CORNWALL.

I. Stannary Court, 26. Custom, II. 1.

II. Customs as to tin bounding, 26. Custom, II. 1.

III. Rights of parties with respect to copper, 26. Custom, II. 1.

IV. Its mining customs subject to the general law of England, 26. Custom, II. 1.

CORONER.

I. Appointment of.

1. By town council of borough.

Quære, whether a coroner in a borough under stat. 5 & 6 W. 4, c. 76, can regularly be (by sect 62) appointed before the grant of a Court of Quarter Sessions has passed the great seal, though within ten days after her Majesty's pleasure to make the grant has been notified to the council:

But a coroner having acted under such appointment, and been recognised in his office by the council, for several years, *Held*, that the office was full, and that an information in the nature of a quo warranto lay to oust a subsequently appointed coroner.

A coroner cannot be elected at a meeting of the council held by adjournment from a quarterly meeting, no summons or notice having been previously served upon the members of the council, stating that such business was to be transacted.

Semble, that a coroner in a borough is not within the provisions of stat. 32 G. 3, c. 58, s. 1. *Regina* v. *Grimshaw*, 747.

2. Semble, appointment under seal not necessary, 747. Antè, 1.

3. Ratification by conduct, 747, Antè, 1.

II. Nature of the office.

Of borough coroner, 747. Ante, I. 1.

III. Remuneration and disbursements.

What the sessions may disallow, and what not.

A coroner is not entitled to any remuneration for holding an inquest, unless, in the judgment of the Court of Quarter Sessions, it

was proper that such inquest should have been held; and the Court of Queen's Bench will not review the judgment of the Sessions on this point.

But disbursements made by the coroner, under stat. 7 W. 4 & 1 Vict. c. 68, after the termination of the inquest, must be repaid to him, whether it was proper that such inquest should be held or not; and the sessions have no power to disallow them. *Regina* v. *Carmarthenshire, Justices*, 796.

COSTS.

I. When considered as accessory, 679. BILLS, II. 4.

II. Payment as a condition.

Of abandonment of order appealed against, 356. ABANDONMENT, I.

III. Of first trial.

Where part of first rule not decided.

After a verdict for plaintiff, defendant obtained a rule nisi for a new trial on the ground of the verdict being against evidence, or to arrest judgment. The Court, on cause shown, granted the rule for a new trial, but did not decide the other point, and reserved the question of costs. Plaintiff succeeded again: and defendant obtained a rule nisi for a new trial, or to arrest judgment on the ground formerly taken. The rule was discharged.

Ordered that defendant should pay the costs of the first trial. *Hunter* v. *Caldwell*, 83.

IV. Under consent rule in ejectment, 531. Post, VI.

V. How recovered.

1. Action for money paid, 679. BILLS, II. 4.

2. Recoverable as damages though not yet paid, 756. DAMAGES, I. 1.

VI. Execution for.

Under stat. 1 & 2 Vict. c. 110, s. 18.

After verdict in ejectment, the successful party may sue out execution on the consent rule for the amount of his taxed costs, under stat. 1 & 2 Vict. c. 110, s. 18, without any previous rule calling upon the opposite party to pay such amount. *Doe dem. Pennington* v. *Barrell*, 531.

COUNTY.

Gaol. GAOL.

COUNTY COURT.

Removal by pone, 274. DURHAM.

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I. Of criminal judicature, 962. GAOL, II.

II. Central criminal, 925. JURY, I.

COURT OF PLEAS.

At Durham, 274. DURHAM.

COVENANT.

I. Joint or several.

What may be declared on as a several covenant.

A covenant whereby "A., B. and C., and any two of them jointly, and each of them severally," covenant with D. that A., B. and C., "or some or one of them," shall pay D. a sum of money, is properly declared upon, in an action of covenant, against A. alone, as a covenant that A. would pay that sum to D. *Addison* v. *Gibson*, 106.

II. Implied, excluded by express covenant, 135. LANDLORD AND TENANT, VIII.

III. In restraint of practice as an attorney, 346. CONTRACT, VI. 2.

IV. Separation of good part from bad, 346. CONTRACT, VI. 2.

COVERTURE.

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In account, 482. ATTORNEY, VIII. 1.

CREDITOR.

Petitioning. 952. BANKRUPT, II.

CRIMINAL CHARGE.

Unfair use of, 252. MALICE, I. 5.

CRIMINAL INFORMATION.

I. Within what time to be moved for.

A criminal information for misconduct in office may be moved for against a magistrate in the second term after the alleged misconduct, though an assize has intervened; the motion being made early enough to allow of cause being shown in the same term. *Regina* v. *Saunders*, 484.

II. For non-repair of highway, 827. HIGHWAY.

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What relates to the business, 962. GAOL, II.

CRIMINAL LAW.

INDICTMENT. SENTENCE. HABEAS CORPUS.

CROWN.

I. Property.

What not a Royal mine, 26, 49. CUSTOM, II. 1.

II. Grant by.

During interval between intimation of Royal pleasure and the passing the great seal, 747. CORONER, I. 1.

III. LAW. CERTIORARI. HABEAS CORPUS. INDICTMENT. MANDAMUS.

CURATE.

I. Appointment: by bishop.

On what non-residence of incumbent, 280. CLERGYMAN, I.

II. Signature of to ancient document, 314. EVIDENCE, XIV. 1.

CUSTODY.

1. Of prisoners sentenced to transportation in Jersey, 492. HABEAS CORPUS, I.
II. Of ancient documents, 326. RENT, I. 1.

CUSTOM.

I. Nature and extent, generally.
1. When viewed as the local law of an extensive district, 26, 62. Post, II. 1.
2. How distinguished from prescription, 26, 61. Post, II. 1.
3. Derogating from general rights of property, 26. Post, II. 2.
4. Immemorial:
What is, 589, 601, 604, 620. COMMON, II. III.
5. What may be due by: heriots, 20. Post, V. 2.
6. With reference to minerals, 26. Post, II. 1.
7. Tests of its being reasonable, 26, 56. Post, II. 1.
II. In alieno solo.
1. Tin bounding: when unreasonable as to time of nonuser.

Declaration, in case, stated that plaintiff was possessed of and entitled to a tenement, to wit, the right to dig and take to his own use, tin and tin ore in certain land; and alleged a disturbance by defendant.

Plea, denying the possession and title modo et formâ.

At the trial, plaintiff claimed under the following custom, which the jury found to exist in fact:—Any person may enter on the waste land of another in Cornwall, and mark out by four corner boundaries a certain area: a written description of the plot of land so marked, with metes and bounds and the name of the person for whose use the proceeding is taken, is recorded in an immemorial local court, called the Stannary Court, and proclaimed at three successive courts held at stated intervals: if no objection is successfully made by any other person, the Court awards a writ to the bailiff of the Court to deliver possession of the said "bounds or tin work" to the bounder, who thereupon has the exclusive right to search for, dig, and take for his own use all tin and tin ore within the described limits, paying to the landowner a certain customary proportion of the ore raised, under the name of toll tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain. *Held:*

That the custom to preserve the right by the mere ceremony of an annual renewal without working is unreasonable and bad in law, and that plaintiff (who had ceased to work or pay toll for 18 years) could not recover in the above action, even as against a stranger: And

That, although the alleged custom involved a claim of a profit in alieno solo, it would have been a good one, if bonâ fide working had been found to be obligatory under it. *Rogers* v. *Brenton*, 26.

2. When a custom to take a profit in alieno solo may be valid, 26, 62. Antè, 1.
III. What rights cannot exist by.
Common pur cause de vicinage between private estates, 581, 620. COMMON, II. 2. 3.
IV. Construction.
When it must be strict, 26, 57. Antè, II. 1.
V. Pleading and evidence.
1. Claim alleged when not sustained by proof of larger right, 26, 55. Antè, II. 1.
2. Evidence: as to other tenements in the same manor.

A heriot may be due by custom, on the death of a tenant, in respect of a tenement of free lands held in fee simple of a manor.

Consequently, to prove such a custom, presentments of the deaths of tenants of other free tenements held in fee of the manor, and the seizure of heriots thereupon, are admissible. *Damerell* v. *Protheroe*, 20.

VI. See also USAGE.

CUSTOMS.

Confiscation by foreign officers, 517. AFFREIGHTMENT, I. 1.

DAMAGES.

I. What may be recovered.
1. Expenses incurred but not yet paid.

Where the declaration for breach of an agreement to assign a lease alleged that plaintiff had been "put to great expenses, amounting to a large sum of money," &c., in investigating the title:

Held, that he might, by way of damage, recover the amount of a bill of costs due to his attorney for investigating the title, though such bill was not paid before action brought. *Richardson* v. *Chasen*, 756.

2. Loss of aid from curate, 461. DEFAMATION, I.
3. Amount.

On wrongful sale under unfavourable circumstances. 101. ASSIGNMENT, I.
II. Against officers.
Treble, against sheriff, 1. STATUTE, I.
III. When sufficiently covered by pleas, 366. BILLS, IV.
IV. Agreement for valuation.
1. Refusal by one party to appoint a valuer.

Declaration on a written agreement, set

under seal, by plaintiff to let land to defendant with right of sporting, defendant to make satisfaction to plaintiff's tenants for damage done by game on their farms, the amount to be ascertained by a valuer to be chosen by each party, and an umpire: averment, that defendant entered, and preserved the game, which did damage to the tenants; that defendant was requested by plaintiff to appoint a valuer: breach, that, although within a reasonable time a valuer was appointed by plaintiff and notice thereof given to defendant, and plaintiff requested him to give the name of a referee on his part, and fix a time, &c., of meeting to ascertain the damage, &c., in default of which the plaintiff's valuer would alone ascertain the damage done, yet defendant did not give notice to plaintiff of any valuer chosen by him, nor has ever made satisfaction, &c.

Held: 1. That after verdict it must be taken that the declaration alleged a refusal by defendant to appoint a valuer.

2. That, although the right to shoot did not pass under this contract, being an incorporeal hereditament, yet the agreement to make compensation was valid, and good ground for an action, defendant having had the full benefit of such agreement.

3. That, for the same reason, the declaration was not bad for not averring performance of a condition precedent.

4. The jury having found that plaintiff did not give notice in a reasonable time of his appointment of a valuer: *Held*, on motion for judgment non obstante veredicto, that, inasmuch as defendant had refused to appoint altogether, this was an immaterial allegation.

5. Defendant having refused an offer of the plaintiff to rectify an alleged defect in the assessment of damages, viz. that it included damages done by rabbits: *Held*, that he was not entitled to a new trial on account of misdirection by the Judge in directing them to include such damages. *Thomas* v. *Fredericks*, 775.

2. Notice of nomination of valuer, how alleged, 775. Antè, 1.

3. Refusal to appoint, how alleged, 775. Antè, 1.

4. Notice of appointment, when immaterial, 775. Antè, 1.

V. Assessment on trial.

New trial on ground of misdirection, when refused, 775. Antè, IV. 1.

DEATH.

Of one of the parties to proceedings in error, 652. Error, I.

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I. When it lies.

1. On a check: between immediate parties, 262. Bills, VII.

2. For use and occupation: by assignee of reversion, 135, 141. Landlord and Tenant, VIII.

II. How arising.

For work done by insolvent between vesting order and discharge, 337. Insolvent, I.

III. Bar of, 482. Attorney, VIII. 1.

IV. Petitioning creditor's, 952. Bankrupt, II.

V. Imprisonment for not paying instalment under order of small debts' court, 630. Commitment, I.

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I. Declarations by, 314. Evidence, XIV. 1.

II. Entries and receipts by, 314. Evidence, XIV. 1. 326. Rent, I. 1.

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I. In particular cases.

1. In debt for penalties against sheriff's officer for extortion, 1. Statute, I.

2. In covenant on a joint and several obligation: declaration may treat it as a several covenant, 106. Covenant, I.

II. In evidence, 314. Evidence, XIV.

III. At foot of poor rate, 908. Poor, XIX. 1.

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I. On rating brickfield, 178. Poor, XII. 1.

II. On rating waterworks, 208. Poor, XIII. 1.

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Evidence of legitimacy, when, 314. Evidence, XIV. 1.

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I. Officer appointed without jurisdiction, 280. Clergyman, I.

II. Officer appointed informally, 747. Coroner, I. 1.

DEFAMATION.

I. Slander: words reflecting on plaintiff in his profession.

Imputation of fraud in transactions as a clergyman.

Case for slander of a clergyman.

1st count, stating words spoken of plaintiff in his profession as follows (with innuendoes, and an inducement stating only that plaintiff was vicar of a church, and defendant a clergyman, and that plaintiff had always conducted himself well in his profession): "The very day I came into residence, Dr. P." (plaintiff) "sent for me: I went and dined with him; and the wine must have been drugged; for I took but two glasses and was quite stupified. While in this condition, Dr. P. put a bill into my hands and requested me to sign it, saying, 'I wish to have it as a security for the payment of 130*l.* per annum for reading for you at the new church.' I

answered, 'Well, give me a pen and I will sign it.' Immediately I had signed it, Dr. P. snatched it up, and, laughing, said, 'this will be quite safe.' The bill, I think, was drawn for 2500*l.* or 2600*l.*: but, having been stupified with the wine, I do not rightly remember." "You cannot suppose that I can visit a man who so cheated me at my first coming." Innuendo, that plaintiff fraudulently obtained the bill from defendant while he was stupified with drugged wine.

2d count, stating words spoken of plaintiff in his profession (with innuendoes, but no further material inducement) as follows: "Dr P. placed before me a bill. I signed: I do not know for what amount it was, whether for 2000*l.* or 3000*l.*; for I was completely pigeoned by Dr. P.:" innuendo, that plaintiff had obtained the bill from defendant by fraud.

Special damage, that plaintiff's curate believed him guilty of the misconduct, and, by reason thereof, was prevented from cordially and effectually assisting plaintiff in the clerical duties and spiritual concerns of the parish.

On motion in arrest of judgment, after verdict for plaintiff, *Held*:

That the 1st count was good, because the words there set forth reflected upon the plaintiff in his profession.

That the 2d count was bad, because the words there did not so reflect.

Venire de novo awarded. *Pemberton* v. *Colls*, 461.

II. Libel: privileged communication.

What letter to secretary of state with respect to a clerk to justice is not.

1. *Held* by the Court of Queen's Bench, in an action for libel, that a letter to the Secretary of State, by an inhabitant of a borough, imputing to a person who is the town clerk, and clerk to the justices of the borough, corruption in the latter office, is not a privileged communication.

2. And that express malice may be proved by evidence that the imputation is in part false, even where the communication is of such a nature as to raise a primâ facie presumption of absence of malice.

3. *Held* by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that it is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it.

4. Where a declaration for libel stated that plaintiff was town clerk and clerk to the justices of a borough, that two persons were apprehended on a charge of embezzlement; and that defendant sent a letter to the Home Secretary, stating that the administration of justice ought to be above suspicion, that one of the above persons, who was taken before justices out of the borough, was defended by plaintiff, that the other, who was taken before the borough justices, was defended by a friend of plaintiff, he himself acting as legal adviser to the justices, that the closest intimacy had long existed between plaintiff and the prisoners and that among the papers of one of them was found an enormous amount of accommodation bill transactions, plaintiff, and others with whom he is associated, being the parties thereto, thus clearing up the mystery as to the uses to which the plunder had been appropriated; that defendant deemed this a state of things demanding a remedy, and called upon the Secretary to take such steps as the justice of the case and the crying evil demanded, "meaning thereby that the plaintiff had conspired with and was an accomplice" of the prisoners in the embezzlement, and also that, as clerk and legal adviser of the borough justices, he had acted corruptly at the examination before them: *Held* by the Court of Queen's Bench, and by the Exchequer Chamber, affirming their judgment, that the letter was capable of the meaning ascribed to it by the innuendo.

Held also, by the Court of Exchequer Chamber, that a libel sufficiently appeared on the declaration, without the innuendo. *Blagg* v. *Sturt*, 899.

III. Malice: evidence.

Partial falsehood, 899. Antè, II.

IV. Trial.

What questions for the judge and what for the jury, 899. Antè, II.

DEFENCE.

I. Party interested, when allowed to conduct it, 908. Poor, XIX. 1.

II. At request of another party; costs, 673. Bills, II. 4.

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I. Through intermediate agent, 262. Bills, VII.

II. What accident no excuse for non-performance of contract to deliver, 517. Attachment, I. 1.

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I. Objections available on general demurrer.

Justification under a bad custom, 581, 620. Common, II. 2.

II. Right to begin.

Where there are cross demurrers. *Eelon* v. *Oliver*, 709.

III. Setting aside as frivolous.

1. To double replication to double plea, 473. Bills, IX.

2. Beneficial tendency of the jurisdiction, 479. Bills, IX.

IV. Admission by, 359. PARLIAMENT, IV. 1.
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Proceedings before, how described, 670. PERJURY, I.

DESCRIPTION.

I. Declaratory, in a deed, 314. EVIDENCE, XIV. 1.
II. Of parcels in a devise, 663. DEVISE, I. 1.

DETENTION.

Until transportations, 502. HABEAS CORPUS, I.

DEVISE.

I. Description of the subject matter.
1. Where part clear and part uncertain.

In 1814 premises were purchased by testator, which in the conveyance to him were described as containing by estimation three acres five perches, and were of that quantity or nearly so. They then consisted of a field, an orchard and a house and garden, and so remained until 1838, when the house and garden, and south part of the field, were let. Testator then made a fence, which prevented all communication between the north and south parts of the field; and the tenant afterwards subdivided the south field into two. The premises continued in this condition until testator's death; he occupying the north field and orchard, and the tenant holding the residue. The north field was at the north corner of the town of M., and opposite a pond.

In 1840 testator devised "all that my messuage or dwelling house, with the outbuildings, garden, orchard and appurtenances thereto belonging," occupied by A. B., "situate on the east side of the town of M," "and a close of land adjoining, being the close at the north corner of the town of" M., "and opposite the pond, and containing, with the garden and orchard, three acres, five perches, more or less," to his daughter in fee.

By codicil in 1841, after reciting that he had given to his daughter "a close situate at" M., "being the close at the north corner of the town of M.," "and opposite the pond, and containing," &c. (as in the will), and now in my occupation:" he proceeded: "Now I do hereby revoke," &c., the devise "of the said close to my said daughter;" and devised "the same close with the appurtenances" to another daughter.

Held, on a question whether the two south fields passed by the codicil, that the description by testator's occupation was clear, that the description by quantity was uncertain, and that the north field only so passed. *Doe dem. Renow* v. *Ashley*, 663.

2. By occupation, 663. Antè, 1.
3. By quantity, 663. Antè, 1.

II. What gives an estate tail.
"Default of such first issue."

Devise (before stat. 7 W. 4 & 1 Vict. c. 26, s. 29) to my son A. T. for life, and "from and after the decease of my son A. T. then to the *first son* of my said son" A. T. "lawfully issuing, and, *for default of such first issue*, then to the use and behoof of the 2d, 3d, 4th and 5th, and all and every other son and sons, the heirs of his or their bodies lawfully issuing;" "and, for default of such issue, then," &c.

Held, that the first son of A. T. took an estate tail. *Doe dem. Harris* v. *Taylor*, 718.

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DISCHARGE.

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When not an excuse for negligence in arresting, 546. EXECUTION, IV. 1.

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1. To enforce rate that might have been quashed on appeal, 868. POOR, XVI. 1.
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3. For church rates, 504. CHURCH RATE.
4. By mortgagee under special power, 957. MORTGAGE, II.
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Of stock.
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I. Distinct instruments on one paper, 846. STAMP, I.
II. Evidence. EVIDENCE, III.—XI.

DUPLICITY.

In pleading. PLEADING, IV.

DURHAM.

Removal of cause from sheriff's court.

A cause commenced in the sheriff's court of the county palatine of Durham cannot be removed at once by pone into this court, but must first be removed into the Durham Court of Pleas.

The Court of Queen's Bench will quash a writ of pone issued in contravention of this rule. *Robinson* v. *Mainwaring*, 274.

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I. Probate and administration duties, 476. EXECUTORS, I.

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III. Between what parties.

1. By trustee against cestui que trust, 130. TRUSTEE, II. 1.

2. By mortgagee against mortgagor, 957. MORTGAGE, II.

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Of incorporeal hereditament under agreement not under seal, 775. DAMAGES, IV. 1.

ENEMY.

Act of the Queen's enemies, 517. AFFRIGHTMENT, I. 1.

ENTRY.

Right of. LIMITATION.

ERROR.

I. Death of parties.

Of defendant in error: executors when to be introduced.

A writ of error does not abate by the death of the defendant in error after judgment signed and before assignment of errors, but may proceed as far as reversal or affirmance without introduction of the executors on the record. Consequently, if the plaintiff in error fail to assign errors in time, judgment of non-pros may be signed, though the executors have not previously been made parties. *St. Katharine Dock Company* v. *Higgs* 652 n.

II. Assignment of errors.

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The question ultimately raised in an ejectment being, whether Elizabeth S., deceased, was legitimate or not, a certificate of the marriage of E. S.'s alleged father, J. D., to her mother was produced by a witness, who said he received it from E. S. The question was then put, whether E. S. made, at that time, any statement respecting her mother's marriage. *Held*, that this question was admissible, it having been proved before to the satisfaction of the Judge, that E. S. was a member of the family, and it not appearing that any dispute was at that time known to exist.

And that it made no difference, as to the *admissibility* of the answer, that the question, whether E. S. was a member of the family, was in fact identical with the issue on which the opinion of the jury would be ultimately taken.

A copy of a register of marriage, signed with the name of a person who had been curate of the parish eighty years before the trial, and who signed as curate, was produced by a witness who had been seven years parish clerk, and who said that the same signature, in the same handwriting, appeared in several places of the original register: *Held* admissible, though no proof was given of the curate's death, and no further proof of his handwriting.

A deed was put in, whereby E. S. conveyed the reversion of the property to E. J. It was signed by E. S., describing herself as "daughter and heiress of J. D.," and by E. J., who was an undoubted relation of J. D., and was tenant for life of the property: *Held*, that the signatures were admissible as declarations, notwithstanding the interest which those parties might be supposed to have in E. S. thus representing herself; it not appearing that any dispute had then arisen. *Doe dem. Jenkins* v. *Davies*, 314.

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1. Under stat. 1 & 2 Vict. c. 110, s. 18, 531. Costs, VI.
2. Expenses of sale: where the sale is not made for the sheriff.
In an action of debt by sheriff against execution creditor for poundage, the defendant claimed to set off the expenses, which he had paid, of a bill of sale and appraisement, preparatory to an assignment in trust for the creditors of the party whose goods were seized.
Held that, without further evidence on the defendant's part, the payment in respect of such a sale could not be considered as made for the sheriff, and could not be set off. *Marshall* v. *Hicks*, 15.
IV. Capias ad satisfaciendum.
1. Where sheriff holds several against the same party: negligence in arresting under a void writ: question for the jury.
Case against the sheriff for negligence in not arresting B., on a ca. sa. issued by plaintiff: alleging further, as a breach, that defendant wrongfully arrested B. under the illegal pretence of another writ, whereas there was no such writ, and falsely imprisoned B., by reason of which B. was ordered by a Judge to be discharged, and was so discharged, and immediately departed out of defendant's bailiwick; whereby defendant deprived himself of the means of lawfully taking or detaining B. under plaintiff's writ, and could not take him under plaintiff's writ after his departure. Defendant pleaded Not guilty, and traversed that he could have arrested B., modo et formâ. It appeared that, after the delivery of plaintiff's writ to defendant, another writ (which was void for defects apparent on the face of it) was delivered to defendant at the suit of A.; that defendant granted a warrant under the last writ; that defendant's officer arrested B. under this warrant, having no other in his possession; and that B. was detained under it, till he was discharged from custody under A.'s void writ by a Judge's order, and afterwards, by another order, from custody under plaintiff's writ; after which B. left the bailiwick.
The Judge directed the jury that there had been no arrest at plaintiff's suit: and that the Judge's order discharging B. from custody at plaintiff's suit, was no justification to the sheriff: and that he would leave to the jury the question, whether defendant had acted negligently in arresting B. on A.'s void writ, and not arresting him on plaintiff's good one, as a question of fact for the jury. *Held*, that the summing up, so far, was correct.
The Judge then directed the jury that, if they believed the evidence, enough appeared to establish such negligence as would make defendant guilty in point of law. *Held* an incorrect ruling. For, that, on the issue joined on the second breach in the declaration (assuming that breach to be well assigned), the Judge ought to have left to the jury the question, whether the defendant knew or ought to have known that A.'s writ was a void one. *Hooper* v. *Lane*, 546.
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No action lies against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved.
Money levied by a regular execution, under a judgment valid on the face of it, cannot be recovered back in an action for money had and received on the ground that judgment was signed, or execution issued, fraudulently, for the whole sum named in the judgment, when part had been already paid.
The remedy, in case of such fraud, is by motion to the Court in which the action was brought, to set aside the judgment or the execution. *De Medina* v. *Grove*, 152.
2. On judgment partly satisfied.
Held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that no action lies against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved. And
Quære, by Wilde, C. J., whether, even if such allegation and proof were made, an action is the proper remedy. *De Medina* v. *Grove*, 172.
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GAOL.
I. Maintenance of borough prisoners in county gaol.
1. What not a contract between the borough and the county.
In 1839, after a petition had been presented for a grant of quarter sessions to the borough of Birmingham, which had no gaol of its own, a negotiation was entered into between the town council and the justices of the county of Warwick, respecting the maintenance of borough prisoners in the county gaol and house of correction for one year; the county quarter sessions resolved that 11*d.* per day for each such prisoner would be a proper charge; and the council resolved that those terms should be acceded to; and such resolutions were entered in the books of the sessions, and on the minutes of the town council. Afterwards, in May, 1839, the borough obtained its grant of sessions. It was then proposed that a contract should be prepared containing the above terms; but none was prepared, in consequence of doubts as to the validity of the borough charter. Prisoners committed for trial at the borough

sessions were conveyed to the county gaol, and there, or in the county house of correction, underwent their sentences. In September, 1839, an account was sent to the borough, charging for the maintenance of prisoners at 11*d.* each per day. In January, 1841, the county justices resolved that the borough justices had no jurisdiction to commit to the county house of correction; and such prisoners were detained till county justices attended to commit them. In September, 1842, another account was sent in on the above scale. In August, 1842, stat. 5 & 6 Vict. c. 98, passed, which provides (s. 18) that, where borough prisoners have been or shall thereafter be sent to county prisons, and no special contract shall be subsisting, the borough shall pay to the county the actual expenses incurred in the maintenance, &c., of such prisoners.

Held that, in this case, there was no such special contract, and that the borough was liable for the actual expenses, which exceeded 11*d.* per head, of all borough prisoners, whether committed by county or borough justices.

Under stat. 5 & 6 Vict. c. 110, s. 4, the gaol of Coventry was purchased by the county of Warwick, out of the funds of the county.

Held, that the cost of such purchase was within stat. 5 & 6 W. 4, c. 76, s. 117, as incurred for a purpose other than the "prosecution, maintenance, and punishment," &c., of offenders committed for trial in the county; and, therefore, that the borough of Birmingham, though it had a grant of separate court of quarter sessions, was liable as part of the county of Warwick for its proportion of the purchase money. *Regina* v. *Birmingham, Mayor, &c.*, 116.

2. How paid for where there is no contract, 116. Antè, 1.

II. Borough gaol. Appointment of keeper, in whom vested.

By charter of 13 C. 2, the borough and inhabitants of Leeds were incorporated; the mayor, recorder, deputy recorder and aldermen for the time being were constituted justices of the peace; and a gaol was granted to them, of which the mayor was to be the keeper. From 1757 to 1813 the borough had a prison, without a residence for the gaoler, for the confinement of prisoners until examination; and the keeper was appointed by the corporation. After examination, the prisoners who were committed for trial, were sent either to York castle or Wakefield gaol, to the expenses of which the borough contributed. Under local acts of 49 and 55 G. 3, a new prison was erected with a residence for a gaoler. This prison, which, like the former, was used for temporary confinement only, was vested by these acts in the borough justices, who were empowered to make orders for its regulation, and to appoint the gaoler. The first-mentioned act saved the rights and franchises of the corporation.

A third gaol was subsequently built, under the provisions of the gaol acts from stat. 4 G. 4, c. 64, to stat. 2 & 3 Vict. c. 56, by the town council.

Held, that the right of appointing the keeper of this gaol related to the business of a Court of criminal judicature, within stat. 6 & 7 W. 4, c. 105, s. 8, and to the regulating of gaols, within stat. 7 W. 4 & 1 Vict. c. 78, s. 38, and was vested, not in the mayor, or recorder, or town council, but in the justices of the borough. *Regina* v. *Lancaster*, 962.

III. What is not a common gaol, 962, 968. Antè, II.

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Objections to unreversed sentence of court of competent jurisdiction.

The return to a habeas corpus commanding the governor of Millbank prison to bring up two prisoners detained in the said prison, stated that they had been convicted, in the Royal Court of Jersey, of breaking into a shop by night and stealing therein, and had been sentenced by that court to be transported to such place as the Queen in council should appoint; that the Court of Jersey

was a court of competent criminal jurisdiction to try and punish the offence; that the Queen in council had ordered that they should be transported to Van Diemen's Land; and that one of the principal Secretaries of State had directed that they should be removed from Jersey to Millbank prison, in order to carry the above sentence and order into effect.

Held, on motion to discharge the prisoners:

That, as the return alleged that the Court of Jersey had jurisdiction to try and punish the offence, and as the sentence of transportation was unreversed, this Court would assume it to be valid, and would not require that the authority of the court to pass it should be set out on the return.

The affidavits could not be used to show that the court of Jersey had no jurisdiction to transport.

That the detention in England was warranted by stat. 5 G. 4, c. 84, s. 17.

That stat. 5 G. 4, c. 84, s. 10, enacting that it should be lawful for the Queen to appoint places of confinement within England for convicts under sentence of transportation, was directory only, and it was not necessary, in order to justify the detention in Millbank prison, that the return should allege that prison to have been duly appointed one of such places of confinement. *Brenan's case*, 492.

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The Court of Q. B. granted an information against the inhabitants of a parish for non-repair of a road, where it was deposed that a bill of indictment had been preferred at the assizes, but thrown out by the grand jury; that two of the grand jurors were proprietors of land in the parish; that one of them, who had acted on behalf of the parish at an earlier stage of the dispute, had stated to the foreman that the road was useless; and that both had taken an active part in opposing the finding of the indictment; such depositions being contradicted only by general statements that the two had taken no undue or active part in opposing the finding.

An order for the examination of a witness, resident in England, but unable from illness to attend the trial, cannot be made in a criminal prosecution, either by the common law authority of the Court or under stat. 1 W. 4, c. 22. *Regina* v. *Upton St. Leonard's*, 827.

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A record of quarter sessions, after stating a conviction on indictment for an assault, at an Epiphany Session, and that it was "*considered and adjudged* by the Court" that defendant should enter into recognisances to appear and receive judgment at the next Quarter Session, and to keep the peace for twelve months, and that such recognisances had been entered into, proceeded to state that judgment was respited upon the indictment until the next Easter Quarter Session, "because the Court here is not advised what judgment to give;" that, at the Easter Quarter Session, judgment was, for the same reason, again respited to the Midsummer Quarter Session; at which last mentioned session judgment was given that defendant should be fined, imprisoned, and enter into recognisances.

Held, that the order at the Epiphany Sessions, that defendant should enter into recognisances, was not a judgment upon the indictment, and did not make the judgment at the Midsummer session erroneous. *Keen* v. *The Queen*, 928.

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After removal from Central Criminal Court.

Before stat. 9 & 10 Vict. c. 24, (s. 3), an indictment alleging the offence to have been committed at the parish of M., in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, was found at the Central Criminal Court, and removed by certiorari to the Court of Queen's Bench.

Held, that the case was properly tried by a Middlesex jury. *Regina* v. *Hunt*, 925.

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2. Whether a publication means what it is alleged to mean, 899. DEFAMATION, II.
3. Scienter, in case for negligence, 546. EXECUTION, IV. 1.
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II. When not equivalent to malice, 152, 172. EXECUTION, VII. 1, 2.

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1. By assignment of lease not under seal, 135. Post, VIII.
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5. Not by distress under special power in mortgage deed, 957. MORTGAGE, II.

II. Tenancy how determined: surrender by operation of law.
Demise by landlord to a third party on request of tenant.

Defendant held premises as tenant to plaintiff under a memorandum of agreement for three years. He left the premises in the first year. On application being then made by plaintiff for rent due, defendant, by letter, authorised plaintiff to let the premises to any one else. Plaintiff then let them to another tenant for three years, and gave him possession. *Held*, in an action of debt on the original agreement, that these facts constituted a surrender by operation of law. *Nickells* v. *Atherstone*, 944.

III. Tenancy how determined: surrender in writing.
See 944. Antè, II.

IV. Tenancy how determined: eviction.
Not where at tenant's request, 944, 946. Antè, II.

V. Length of term.
What not necessarily for more than a year.

Premises were demised under a written agreement, dated 4th August, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of 55*l.* payable half-yearly, "except the *last half year*, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear." Tenant "to allow the landlord, or incoming tenant, *in the last year*, to enter on 1st May, to make fallows, and carry out the manure," for which compensation was to be paid, &c. Tenant to have "the use of the barns for stacking and threshing the crops of *the last year* till the 1st day of May after the tenancy."

Held, that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year.

Consequently that the tenancy was determined by a notice dated 24th March, 1846, to quit at Michaelmas that year. *Doe dem. Plumer* v. *Mainby*, 473.

VI. Tenancy from year to year.
Determination at the end of the first year, 473. Antè, V.

VII. Rent: at what periods payable.
Yearly, not quarterly.

Agreement to let and take premises "from the 25th March, 1844, for a twelve-month certain, and thence for the continuance of the term of the lessor's interest in the premises, so long as it shall continue, until determined by a six months' notice from the tenant, expiring at any quarter of a year, at the rent of 120*l.* a year:" *Held*, that the rent was payable yearly, and that rent for a

quarter ending 25th December, 1845, could not be recovered in an action for use and occupation. *Collett* v. *Curling*, 785.

VIII. Assignee of reversion.

What action he may maintain, and when.

Stat. 32 H. 8, c. 34, applies to leases by deed only; and where a lease is not under seal, the assignee of the reversion cannot maintain assumpsit against the lessee for breach of his contract with the assignor to repair.

There is no implied contract to use demised premises in a tenantlike manner, where the tenant has expressly contracted to repair.

Where a lease for a term certain was granted by writing not under seal, which contained an undertaking on behalf of the lessor and his assigns for quiet enjoyment: *Held*, that his assignee might maintain assumpsit for use and occupation; for the lessor having granted for himself and his assigns, the permission of any person who might become assignee of the reversion during the lease was virtually included, so that the occupation became in point of law permissive on the part of the assignee as soon as his interest accrued.

Copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, are evidence of the existence of a manor and of such property being within it, in an action by the surrenderee in which his ownership is disputed. *Standen* v. *Christmas*, 135.

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1. What run with the land, 135. Antè, VIII.
2. Implied excluded by express contracts, 135. Antè, VIII.

X. Landlord's remedies: use and occupation.

Permission by assignee of reversion, when sufficient to maintain assumpsit, 135. Antè, VIII.

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II. Surrender by operation of, 944. LANDLORD AND TENANT, II.

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5. Questions of malice and want of probable cause, how to be dealt with at the trial.

In an action for malicious prosecution, the facts material to the question of probable cause must be found by the jury; and the judge is then to decide, as a point of law, whether the facts so found establish probable cause or want of it:

Among these facts are the defendant's knowledge of the alleged ground of accusation at the time when he prosecuted; and his belief, at that time, that the conduct forming such ground of accusation amounted to the offence charged.

If the defendant did not so believe, the want of reasonable and probable cause is established, though the imputed offence appear primâ facie to have been committed by the plaintiff, and the fact to have been known to the defendant, before the charge was made.

The absence of belief must be proved by the plaintiff. And, if it be not proved, the defect is not supplied (for the purpose of showing want of probable cause) by evidence that the defendant made use of the charge as a means of obtaining an unfair advantage over the plaintiff. *Turner* v. *Ambler*, 252.

6. Burthen of proof, 252. Antè, 5.

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1. To enforce order not questioned on certiorari, 700. POOR, I. 1.
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1. Direction, *Mayor, &c., of Sandwich*, v. *The Queen*, 574, 579.
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1. Identity of proceedings when sufficiently shown by, 763. POOR, XXXI.
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V. Pleading.
1. Claimant's title: estoppel by obedience to former writ.

Mandamus, to a borough corporation, recited that the prosecutor had held certain offices of profit within the borough; that under stat. 5 & 6 W. 4, c. 76, he was removed therefrom: that he preferred his claim for compensation to the town council, who disallowed the same; that he then obtained a mandamus requiring the corporation to assess compensation, and to secure the amount by bond; and that they assessed 60*l.* per annum, whereupon he appealed to the Lords of the Treasury, who awarded 112*l.* per annum. The writ concluded by requiring the corporation to give their bond for such last mentioned amount.

Return: 1. That claimant did not hold certain of the said offices. 2. That he had made a former appeal to the Lords of the Treasury, against the original disallowance by the town council, and that the Lords of the Treasury had then assessed only 60*l.* per annum.

To the first part of the return, the claimant pleaded estoppel, stating the assessment in compliance with the former writ, and stating also that the corporation had returned to that writ that they had made such assessment. To the second part of the return, demurrer.

Demurrer, to the plea of estoppel, for duplicity.

Held by the Court of Queen's Bench, that the corporation were estopped from denying that the claimant held the offices in question: That the Lords of the Treasury had jurisdiction to entertain the second appeal and award the 112*l.* And (per PATTESON and WIGHTMAN, Js.) that the plea was not bad for duplicity.

Held by the Court of Exchequer Chamber, on error, that the Lords of the Treasury had no jurisdiction to entertain the first appeal, the claim having been altogether disallowed by the town council, and the matter of appeal being therefore not a question of amount but of right; and, consequently, that the Lords might entertain the second appeal, and their award upon it was conclusive.

That the plea was bad for duplicity.

But that the assessment by the corporation under the former mandamus, admitted by the present return, estopped the corporation from denying that the claimant held the offices in question. And that the claimant

was entitled to judgment. *Regina* v. *Sandwich, Mayor, &c.*, 563.
2. Estoppel ill pleaded in plea, but appearing by the return, 563. Antè, 1.
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Held, that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgagee from bringing ejectment. *Doe dem. Wilkinson* v. *Gaudier*, 957.

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XI. Borough rate.
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The council of a borough ordered that an equal borough rate should be made on the several parishes, parts and districts within the borough, for raising a sum therein specified, and that for that purpose, the several parishes, &c., in the borough should be rated in the several amounts specified in the order, and that the part of the parish of S. which lay within the borough should be rated at 365*l.*; such several sums rated being estimated at 1*s.* in the pound upon the rateable property; and that the churchwardens and overseers of entire parishes within the borough, and the persons appointed to act as overseers for parts of parishes within the borough for making, levying, and collecting borough rates and watch rates therein, should respectively "*levy, collect and pay*" the amounts rated by the said order upon their parishes, parts or districts: the amounts so rated upon entire parishes to be paid out of the poor rates made and collected, or to be made and collected, for such parishes; and that a warrant, under the hand of the mayor and the corporate seal of the borough, should issue to the town clerk, requiring him to demand and receive of the several parish and special overseers, described as above, the amounts so rated; and, for this purpose, to issue his warrants to such overseers and persons appointed, &c., requiring them to "*collect, levy and pay*" to him the same amounts.

The council issued warrants in the prescribed terms respectively to the town clerk, who thereupon issued like warrants to the parish overseers, and to the special overseers who had been previously appointed for the said parts of parishes.

The special overseers of part of the parish of S. then made a rate thereon for 427*l.*, being at the rate of 1*s.* 2*d.* in the pound.

The town council also made an order for a watch rate, with respect to which the same proceedings were taken as above mentioned. The order rated the said part of S. at 153*l.*, being at 6*d.* in the pound; and the special overseers made their rate for 160*l.*, being at the same rate of 6*d.* in the pound. Warrants of distress were duly issued for non-payment of these several rates.

Held, in trespass for seizure under such

parish and special overseers, under stats. 55 G. 3, c. 51, 5 & 6 W. 4, c. 76, and 7 W. 4 & 1 Vict. c. 81, to levy by means of rates.

And that, as by stat. 7 W. 4 & 1 Vict. c. 81, s. 1, the council might order the overseers of entire parishes either to pay the borough rates out of a poor rate made or to be made, or to make a special rate for payment of them, it was necessary for the orders of council to specify which of the alternatives was to be adopted. But,

That, as the quota of borough rates assessed upon part of a parish could be paid in no other manner than by a special rate, it was not necessary that the orders should direct such rate to be made.

Quære, whether the borough rate was bad for excess.

Held, that the watch rate was good. *Cobb* v. *Allen*, 683.

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witnesses.

To compel attendance without stating the reason, 359. Post, IV. 1.

IV. House of Commons: speaker's warrant.

1. To be construed as process of superior court.

Trespass for assaulting plaintiff, seizing him, compelling him to go along a passage to a certain room, and afterwards along another passage to another room, and then imprisoning him, viz. for two hours then next, &c., and then compelling him to return through the first mentioned passage to the first mentioned room, and there detaining him, viz. for two hours then next, &c.

Plea. That a parliament was sitting, and that matters were under discussion in the House of Commons, concerning which the House considered it necessary that plaintiff should be examined at their bar: that, for the purpose of procuring his attendance to be there examined concerning them, *it was ordered by the House*, in pursuance of and according to the ancient usages and privileges of the House and the law and custom of parliament, *that the plaintiff should attend the said House forthwith*, of which he had notice: that he contemptuously refused, and absented himself: and thereupon, and in order to compel plaintiff's attendance at the bar to be examined, &c., it was ordered by the House, in pursuance of and according, &c., that plaintiff should be sent for and brought before the House in custody of the Serjeant at Arms attending the House, and that the Speaker should issue his warrant accordingly: whereupon the Speaker, in pursuance of the said order, and in pursuance of and according, &c., in order that plaintiff might be brought in the custody of the Serjeant at Arms before the House according to the order, &c., for the purpose aforesaid, by his warrant in that behalf duly made, "*after reciting that the House of Commons had, that day, ordered that the plaintiff should be sent for in the custody of the Serjeant at Arms attending the said House, did require and authorise the Serjeant at Arms then attending the said House of Commons to take into custody the body of the plaintiff.*" Averment, that defendant then was the Serjeant at Arms; that the Speaker duly delivered the warrant to him to be executed; by virtue and in execution of which warrant the defendant, as such Serjeant at Arms, &c., gently laid his hands on plaintiff to arrest, and did arrest him, and did then, in order to bring him before the House in execution of and in obedience to the warrant, necessarily force and compel plaintiff to go, &c. (as in the declaration), using no unnecessary violence, &c., and did then necessarily several times, &c., until defendant could bring plaintiff before the said House of Commons in obedience to the said warrant, the same being reasonable times, &c., using no unnecessary violence, &c. Verification.

On demurrer to the plea,

Held by the Court of Queen's Bench, Williams, J., dissentiente, that the plea showed no justification.

By Lord Denman, C. J., Williams and Coleridge, Js., that the House had jurisdiction to order plaintiff's attendance for the purpose of examination, without informing him of any reason for the order, and, on disobedience, to enforce it by compulsory process.

But, by Lord Denman, C. J., Coleridge and Wightman, Js., that the validity of the warrant as a justification to the officer must be judged of by the terms of the warrant as pleaded independently of anything contained in the order.

And that, if the warrant as framed was illegal, the officer was not justified on the ground that he had made the arrest by order of the House.

Per Lord Denman, C. J., and Coleridge, J., Williams, J., dubitante: That it did not, on these pleadings, stand admitted that the warrant was framed according to the usages and privileges of the House and the law and custom of parliament.

Per Lord Denman, C. J., and Coleridge J. The warrant was bad, though purporting to be issued under an order of the House of Commons, because it did not specify any cause for the arrest.

Per Lord Denman, C. J., and Wightman, J. The warrant, as framed, even if valid for the purpose of taking, did not justify any of the alleged trespasses, beyond the taking.

Per Williams, J. The warrant was not to be examined strictly like that of an inferior court, or justice of the peace; and, using the latitude of intendment allowed in construing warrants of superior courts, and coupling the mandatory part with the recital, it might be understood that the warrant ordered the officer of the House to bring the plaintiff before them for a cause which they had deemed sufficient to authorise sending for him: and for the sufficiency of that cause credit must be given to the House as to a superior Court.

Held by the Court of Exchequer Chamber, reversing the judgment of the Queen's Bench, that, if the warrant had been that of a justice of the peace or of a court acting under a special statutory authority, the objections would have been fatal. But that the warrant must be construed as process of a superior court, not appearing, on the pleas

And that the language of the warrant justified as the alleged trespasses. *Howard v. Gosset*, 279.
2. Whether to be judged independently of order, 279. *Antè*, I.
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I. Indictment: the oath.
Before whom taken.
1. In an indictment for perjury on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken "before the sheriffs," though in fact the cause was tried before the Secondary.
2. On trial of the indictment for perjury, it appeared that, in the cause tried before the Secondary, two issues were joined on the record; but the postea showed only a verdict on one: *Held*, that these facts sufficiently bore out an allegation in the indictment that the "issues came on to be tried, and were tried,' and that the perjury was committed "upon the trial of the said issues."
3. It is a good assignment of perjury that a witness swore that he "thought" a certain writing was not his, whereas in truth and in fact he "thought" that it was his.
4. It is no good objection, in arrest of judgment on such indictment, that it charges defendant with having sworn that he had not written certain words in the presence of A., whereas in fact he had written them in the presence of A.; with an averment of materiality; for A.'s presence cannot be assumed to be necessarily an immaterial fact, though the materiality does not appear otherwise than by such averment. *Regina v. Schlesinger*, 670.
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POOR.

I. Powers of Commissioners.

1. To order overseers to appoint returning officer.

The Poor Law Commissioners have jurisdiction to order that the overseers of the townships comprised in an union shall appoint a returning officer for an election of guardians.

Semble, per Lord DENMAN, C. J., *dubitante* COLERIDGE, J., that, if an order of the Commissioners be on a subject matter within their general jurisdiction, its legality in other respects can be questioned only on removal by certiorari, and, in default of such removal, a mandamus will go to enforce it. *Regina* v. *Oldham Union*, 700.

2. To order payments, 91. Post, IV. 3.
3. Order, to whom to be addressed, 91. Post, IV. 3.

II. Orders of commissioners.

1. How they may be questioned, 700. Antè, I. 1.
2. Order bad as illegally omitting an alternative mode, 91. Post, IV. 3.

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IV. Board of guardians: their acts.

1. Authority to act for the particular parishes, 812. Post, XXVI.
2. Inference that they relieve by authority of a particular parish, 812. Post, XXVI.
3. Their order to make rate: when bad as founded on illegal order of the Poor Law Commissioners.

Under the Parochial Assessment Act, 6

guardians of a union, ordered that a survey of a parish within the union should be made and the money provided for by a charge on the rates of the parish; and the guardians having ordered the officers of the parish to make a separate rate for raising the required sum: *Held*, that the order of the guardians was bad, because, if the statute gave them power to choose in which of the two modes payment should be made, then the order of the Poor Law Commissioners was invalid, as illegally directing payment in one mode, and the guardians were therefore making an order of their own authority, which they could not do.

Quære, whether, under this section, the order of the Poor Law Commissioners that a survey should be made, ought not to be addressed to the guardians, parish officers, and other officers from whom the "representation" mentioned in the first part of sect. 3 proceeds.

Quære, whether the words "as they may see fit," in this section, refer to the Poor Law Commissioners or the guardians.

Quære, whether, under stat. 4 & 5 W. 4, c. 76, s. 105, rules bad in themselves, but not removed by certiorari, must be obeyed; or whether that section only provides that rules removed by certiorari must be obeyed until they have been declared illegal by the Court of Queen's Bench. *Regina* v. *Bangor, Churchwardens, &c.*, 91.

V. Churchwardens and overseers.

1. Mandamus to obey orders of guardians to make rates, 91. Antè, IV. 3.
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4. Duty to obey orders of commissioners, 700. Antè, I. 1.

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1. His acts when not the act of the parish, 223. Post, XX. 1.
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VII. Survey.

How ordered and paid for, 91. Antè, IV. 3.

VIII. Rate: how laid.

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IX. Rate: declaration.

Good, though not in the very words of statutory form, 908. Post, XIX. 1.

X. Rate: allowance.

Notice of publication need not state, 908. Post, XIX. 1.

XI. Rate: publication.

Notice need not state allowance, 908. Post, XIX. 1.

course of being consumed.

On appeal against a poor rate, by the occupier of a brick field, a case was stated showing: That the appellant held the land (ten acres) for the purpose of getting from it clay to make bricks, under a lease for seven or fourteen years, or till the earth should be all dug out. That he paid 2*l.* per acre, without reference to the use made of the land, and a royalty of 1*s.* 6*d.* for every thousand of bricks moulded in any one year: That the value of land in the parish, let for general agricultural purposes, was 2*l.* 6*s.* a year: That the appellant had on the land four brickmaking "stools," each stool capable of producing 750,000 bricks: That the field originally contained sufficient clay for thirty-one millions of bricks: That in the year before the rate was laid the appellant had made nearly three millions: and that there remained clay enough for twelve millions. The sessions also found that the rent which a tenant would have been willing to pay on taking a lease of the premises with liberty to consume the brick earth, and without being liable to royalty, was 10*l.* per acre. And they confirmed the rate, by which the appellant was assessed at 2*l.* 6*s.* per acre, and for royalty at 1*s.* 6*d.* per thousand on as many bricks as the stools were capable of producing in a year. *Held*:

That the rent, estimated according to stat. 6 & 7 W. 4, c. 96, s. 1, was the proper criterion of the rate on this property.

And, assuming the above facts to have appeared, without any specific finding as to the rent which a tenant would be willing to pay,

That the royalty, together with the fixed annual charge, was properly considered as the rent. That the payment in respect of the brick earth was not the less a rent because the subject matter of the renting was in a course of being wholly consumed. That, in absence of proof to the contrary, the sessions were right in assuming the number of bricks which the stools could make to have been actually made within the year of rating. That the rate was properly assessed on the number supposed to be made in the particular year. And that no deduction was to be made for the breeze, ashes, and other materials used in making the bricks, it being presumable that these were allowed for in fixing the royalty.

But, *Held* further:

That, the sessions having found specifically the sum which a tenant in their opinion would give on taking a lease with liberty to consume the earth, and without royalty, namely 10*l.* a year per acre, that sum for

deducted) must be considered as the rent within the meaning of stat. 6 & 7 W. 4, c. 96, s. 1; and no inference from other facts was admissible. And this Court ordered the rate to be amended accordingly.

In another case not materially differing, but in which the sessions neither expressly stated the rent, which, in their opinion, a tenant might reasonably be expected to pay, nor gave data for estimating it, except by stating the number of stools at work, and the amount of royalty actually paid (under an agreement still subsisting) in the five years immediately before that for which the rate was made; and the question propounded was "What is the net annual value of the land?"

Held: that the fixed sum paid for occupation, and the royalty, constituted the rent: but that this Court could not determine the amount which, at the time of making the rate, a tenant about to take a lease might reasonably be expected to pay. Nor, in the absence of materials for such estimate, could the assessment be grounded on the ordinary amount of rent paid for land in the parish used for agricultural purposes, or the amount paid for the best garden ground in the parish.

The Court sent the rate back to the sessions, to be amended according to the principles laid down in the preceding case. *Regina* v. *Westbrook*, 178. *Regina* v. *Everist*, 178.

2. On brick field, 178. Antè, 1.
3. Finding of sessions conclusive, 178. Antè, 1.
4. Case sent back for uncertainty in finding of sessions, 178. Antè, 1.
5. Rent, not outlay of capital, the criterion, 208. Post, XIII. 1.
6. Gross receipts how far a criterion, 208. Post, XIII. 1.

XIII. Rate: rent how calculated: public works extending into several parishes.

1. The indirectly productive parts, rate and deductions in respect of.

The works of a water Company extended into several parishes and consisted of two portions: one of which, being the service pipes which delivered the water to the consumer, was directly productive of profit; and the other, consisting of reservoirs, buildings, &c., indirectly conduced to such production. In some parishes the Company had no works but service pipes. The rateable value, for the purposes of poor rate, of the entire works was 30,800*l*. The rateable value of the reservoirs, buildings, &c., valued as land and buildings deriving additional value from their capacity of being applied to the objects of a water company, was 6500*l*.

Held, that the rateable value ought to be apportioned among the several parishes in the following manner:—The rateable value of the reservoirs, buildings, &c, valued as above, to be first deducted from the total rateable value, and distributed among the parishes in which this portion of the works was situate, according to the extent of such works in each parish; and the residue of the rateable value to be apportioned among the parishes containing the service pipes, in the ratio of the net profits produced in each of those parishes. *Regina* v. *Mile End Old Town*, 208.

2. The directly productive parts how to be rated, 208. Antè, 1.
3. Apportionment, 208. Antè, 1.

XIV. Rate: rent how calculated: deductions.

1. None for materials presumably allowed for in fixing rent, 178. Antè, XII. 1.
2. Rent of indirectly productive parts of public works, 208. Antè, XIII. 1.

XV. Rateable property: beneficial occupation.

1. Public hospital: partial payment but no profit.

1. Bethlem hospital is erected on lands in the parish of St. George, Southwark, demised to trustees for the mayor and corporation of London, under stat. 50 G. 3, c. cxcviii., which directs the building thereon of a new lunatic hospital in lieu of the old one, situate in the city of London, of which the Corporation were governors under letters patent of 38 Hen. 8. In this hospital indigent lunatics are received for cure, and, if not capable of cure, are received into the incurable class. Payments are made for some of the incurable by friends of the patients, or by the officers of the parishes from which they are sent: but the payments are in no instance sufficient to afford a profit. Part of the hospital is used for the custody, care, &c., of criminal lunatics, for whom Government make a payment, as nearly as possible equal to the expense of their maintenance, &c., but without charge for lodging. The whole funds are applied for the purposes of the charity.

Held, that the corporation of London were not rateable for these premises, although, by stat. 50 G. 3, c. xlv. s. 1, persons occupying, &c., "any land, ground, house, building, tenement, hereditament, or premises in the parish," were rateable to the relief of the poor: it being enacted by sect. 28 of the same act (after noticing by recital the existence of many charitable institutions in the parish which contributed nothing to its exigencies) that no settlement should be gained in the parish by any occupation, residence, &c., in any hospital, or other charitable institution, then or thereafter situated or established in the parish.

2. The "House of occupations" in the

demised to trustees for the Corporation of London, as governors of Bridewell, which is an hospital for the reception of destitute persons and vagabonds, and for their correction and employment. The House of occupations is used for the reception of such persons, from any place whatever, found within London, Middlesex, or part of Surrey. They are employed in working up goods, for which the materials are found by the governors, and which are partly consumed on the premises and partly sold; and the money received from the sale of such part as is sold is brought into the general funds of Bridewell Hospital, which are applied solely for the purposes of the charity, the governors deriving no profit from the sale.

Held, that the Corporation were not rateable for the "House of occupations." *Regina v. St. George, Southwark*, 852.

2. Under what words the occupation would be rateable, though not beneficial, 852, 863. Antè, 1.

3. Missionary society: occasional rent and sales.

The Baptist Missionary Society were assessed to a paving rate, made under 57 G. 3, c. xxix. (Metropolitan Paving Act), as occupiers of a house and premises, the property of the Society. The Society is founded with the object of sending out missionaries for the conversion of the heathen. It is chiefly supported by voluntary contributions, and in part by the interest of a fund; and no member derives any private advantage from his connection with it.

The premises comprise various apartments, the whole of which are required for the purposes of the Society, but which are at times used by other societies of the same nature, who, in return, contribute a part of the expense of the lighting, warming and cleansing of the premises; but the sum so contributed does not exceed the expense incurred in consequence of their use of the premises. The Society prints reports and periodicals, which are stored on the premises, and occasionally sold there, but at less than their prime cost; the proceeds of such sales being carried to the credit of the Society.

Held that the rate was good, for that there was, under the circumstances, a beneficial occupation by the Baptist Missionary Society.

Semble, That persons occupying premises merely for religious ends are not, on that account, exempt from poor rate. *Regina v. Baptist Missionary Society*, 884.

XVI. Rateable property: literary society.

1. What benefit or interest to contributors

taking in books and periodicals, to be read by any person choosing to become a subscriber; every subscriber to pay two guineas on becoming a member, and 30s. in advance annually; and to have the power of transferring his property in the library to any person who should submit to the laws of the Society; no dividend, gift, division, or bonus in money to be made to or between any of the members.

Held, 1. That, to constitute a society supported by voluntary contributions, within stat. 6 & 7 Vict. c. 36, it was not necessary that the contributions should produce no kind of return to the contributors; and that neither the right given to every subscriber of transferring his share, nor the contingency that, whenever the Society might dissolve itself, there would ensue a division of its property among the members, made the Society other than a society within sect. 1, viz. a society which "shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members;" and that the occupier of buildings used for the purposes of the Society was, under the above statute, exempt from poor rate.

2. That a person exempt from poor rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy made to enforce such rate, not appealed against. *Birmingham, Charlesworth, v. Shaw*, 868.

2. What annual subscriptions are voluntary contributions, 868, 875. Antè, 1.

3. Right of division on dissolution does not take away exemption, 868, 877. Antè, 1.

4. As to religious societies, see 884. Antè, XV. 3.

XVII. Rateable property: joint occupation.

1. Rate how enforced, 908. Post, XIX. 1.

2. Where there is no evidence as to some of the parties rated who do not appeal. *Regina v. Chasemore*, 924.

XVIII. Appeal against rate.

When the only remedy.

On claim of exemption, 868. Antè, XVI. 1.

XIX. Rate: how enforced.

1. By distress against one of several who are jointly rated.

Under stat. 1 W. 4, c. 21, s. 4, after a magistrate has made a return to a mandamus requiring him to issue a distress warrant, and the prosecutor has demurred, the Court of Queen's Bench will give leave to the party interested, who has had notice under the rule nisi for the mandamus and has shown cause,

the application for such leave.

Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, That

Any one of several joint occupiers is liable for the whole amount of their joint assessment to a poor rate; and a warrant of distress against any one alone is good:

A poor rate is not invalid because the declaration at its foot is not in the very words of the form given by the schedule to stat. 6 & 7 W. 4, c. 96:

Notice of publication of a poor rate need not state that the rate has been allowed. *Paynter* v. *The Queen*, 908.

2. Though the rating might have been quashed on appeal, 868. Antè, XVI. 1.

XX. Settlement: acknowledgment by relief.

1. Connection of the parish with the act of relief: relieving officer.

Relief given by the relieving officer of a union, as on behalf of parish W. to paupers residing in parish M. (both in the union) is no evidence of a settlement in W. without proof that such relief was authorised, or at least known and not objected to, by a guardian of the union acting for W., or by its overseer. *Regina* v. *Little Marlow*, 223.

2. Connection of the parish with the act of relief: board of guardians, 812. Post, XXVI.

XXI. Settlement: derivative.

Sufficient statement of marriage, 971. Post, XXIV.

XXII. Settlement: certificate man.

What particulars he must have complied with, 971. Post, XXIV.

XXIII. Settlement: parish apprenticeship.

1. Assent of justices shown by registry.

On appeal against an order of removal, the respondents alleging a parish apprenticeship, and ground having been laid for the reception of secondary evidence, the respondents produced the register book of parish C., which contained an entry in the form prescribed by stat. 42 G. 3, c. 46, s. 1, stating that, on 7th April, 1823, W. S., aged, &c., son of, &c., was bound apprentice to R. B., farmer, residing, &c., until the age of twenty-one, by the overseers of C., who were named. In the last column were the words "Magistrates assenting. J. H., L. St. A.", which appeared to be the actual signatures of magistrates so named. The apprenticed party, in his examination, deposed that he was bound apprentice by the overseers of C., and stated the other particulars relating to himself, as given in the register. The sessions held, on objection taken, that the examinations did not contain sufficient legal evidence of the apprenticeship, because they G. 3, c. 139, s. 1, though in the opinion of the sessions it did appear that the justices had allowed, by signing and sealing, an indenture which recited an order. And they quashed the order of removal, subject to a case which put the question: Whether sufficient legal evidence of a parish apprenticeship appeared in the examinations.

Held, that the signature of the justices would have been evidence of an assent under stat. 42 G. 3, c. 46; but that the sessions could not presume from the facts and documents an order or an allowance by the justices pursuant to stat. 56 G. 3, c. 139, s. 1. *Regina* v. *East Stonehouse*, 230.

2. Order and allowance by justices not shown by registry, 230. Antè, 1.

3. Evidence of order and allowance before removing justices.

To prove before a removing magistrate that the pauper was bound apprentice by parish officers under stat. 56 G. 3, c. 139, it is not sufficient to put in the indenture itself, and verify the attestation: the order for binding and the allowance of the indenture must also be severally proved: and a due making, so proved, of such order and allowance must appear by the examinations sent with the copy of order of removal. *Regina* v. *Chiswick*, 241 n.

XXIV. Settlement: renting a tenement.

Insufficient ground of appeal alleging acquisition of settlement by certificate man.

An examination in support of a derivative settlement gave the date of the marriage of the pauper's father, but omitted to give the place. The Sessions decided that the omission was immaterial; and this Court, on a case stated, confirmed their decision.

A ground of appeal against an order of removal stated that C., who resided in the respondent parish under a certificate, acquired a settlement therein "by reason of his settling upon, and renting and occupying a tenement of the yearly value of 10*l.*," &c. *Held* that the ground of appeal was insufficient under stat. 9 & 10 W. 3, c. 11.

A case from quarter sessions must not submit a question to this Court on the sufficiency of examinations or grounds of appeal, with a direction that, if the Court should decide in favour of their sufficiency, the case may be sent back to sessions to be reheard on the merits: but the merits should be heard by the sessions in the first instance, so that, if any question then remain for this Court, its decision may be final. *Regina* v. *Marton cum Grafton*, 971.

XXIV. Removal: examinations.

1. Must show order for and allowance of parish apprenticeship, 241 n. Ante,

XXVI. Removal: documents to be sent.

Not a copy of preliminary examination not formally taken.

On application for an order of removal, the pauper was sworn before the justices; and her evidence was taken down in writing by the attorney for the parish applying for the order, who acted in that character only, and not as clerk to the justices: the writing was signed by the pauper; but no jurat was added to the writing; nor was it signed by the justices. At a subsequent hearing, the pauper was again examined, and her evidence taken down in writing; to this writing a jurat was added; and it was signed by the justices: and a copy was sent to the parish to which the removal was made. *Held*, that it was not necessary, under stat. 4 & 5 W. 4, c. 76, s. 79, that a copy of the former writing should be also sent.

Relief given to a pauper by order of the board of guardians of a union, on account of a particular parish therein, is evidence, on appeal by such parish against an order of removal, that the relief was given by its authority. *Regina* v. *Crendall*, 812.

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1. Finding of sessions conclusive against any other inference from the facts stated, 178. Antè, XII. 1.

2. Must be so reserved that the decision of this Court will be final. 971. Antè, 76, s. 79, that a pauper shall not be removed until twenty-one days after a copy or counterpart of the order has been served on the parish to which the removal is directed to be made, is not incorporated in sect. 54, and is not applicable to the case of lunatic paupers.

Therefore the next practicable session to try an appeal against such order is that for which notice of appeal can be given, according to the ordinary practice of the sessions, irrespectively of stat. 4 & 5 W. 4, c. 76, s. 79. *Regina* v. *West Riding, Justices*, 768.

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I. Fee farm.
1. Within stat. 4 G. 2, c. 28, s. 5.

A cognisance in replevin acknowledged the taking as for a distress for arrears of a fee farm rent, alleging that B. "was seised, as of fee and right, of and in a certain annual fee farm rent, of 1l. 9s. 3d., payable for and in respect of, and issuing and payable out of," the locus in quo. Title was then traced from B.; and it was alleged, that the rent "had been duly answered and paid for the space of three years within the space of twenty years next before the first day of the session of Parliament beginning and holden at Westminster the 23d day of January, 1727, in the 1st year of the reign of the late King George the Second, and from thence continued by several prorogations to the 21st January, 1731, being the 4th session of that parliament."

Held sufficient, after verdict, under stat. 4 G. 2, c. 28, s. 5, though neither the origin nor nature of the fee farm rent was further shown.

Issues being joined upon pleas traversing the original seisin of the rent, and the payment for the three years, books were put in, which the present receiver, who, as such, had custody of the rentals and title deeds, produced from his own custody. These books contained rent rolls for many years, with entries of sums received in respect of the several rents therein contained, and

among others the rent in question. The books were not signed. He also produced a paper from the same place, signed by E. R., deceased, wherein E. R. debited himself with the receipt of an aggregate rental (not stating the items) of between 700*l*. and 800*l*., corresponding almost exactly with the aggregate of the rentals in the books.

Held, that the account and books might be connected, as an entry by a deceased person charging himself, and were evidence for the jury of the payment of the rent in question.

Under stat. 4 G. 2, c. 28, s. 5, it is sufficient that the rent has been paid for three years severally complete within the twenty years before the first day of the session of parliament mentioned in that clause, though such three years be not consecutive. *Musgrave* v. *Emmerson*, 326.

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At what period the parent's relation of master must subsist.

In trespass for seduction of plaintiff's daughter, per quod servitium amisit, it appeared that the daughter had been seduced while out at service, and that she left her service in a state of pregnancy, and returned home, where she was supported by the plaintiff until and after her confinement.

Held that, as the implied relation of mistress and servant did not subsist between plaintiff and the daughter at the time of the seduction, the action was not maintainable. *Davies* v. *Williams*, 725.

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I. Powers of Commissioners.

To unite levels.

Within a district under the jurisdiction of Commissioners of Sewers, were three (among other) levels, S., W. and N. Each was separately assessed for its own drainage. Afterwards the S. and W. levels were united by certain works into one level; and, some years after, the level formed by such union was united by new works with the N. level. The inhabitants of the N. level then derived benefit, in common with the rest of the inhabitants of the last united level, from the sewers of the whole last united level, but they were not benefited, and were prejudiced, by the union, their own sewers, which previously were sufficient to drain the N. level, being now, for the purposes of the whole last united level, more used than before.

By a jury at a Court of Sewers for the district under the jurisdiction of the Commissioners, plaintiffs, who were occupiers of land in the N. level, were presented as owners and occupiers of taxable property within the district. The Commissioners of Sewers confirmed this presentment, and laid a single rate on the united S., W. and N. level.

by the Exchequer Chamber, affirming the judgment of the Queen's Bench:

1. That the Commissioners had power, at their discretion, to unite the levels.

2. That plaintiffs, deriving benefit from the sewerage of the level formed by such union, were liable to be assessed to the joint rate for the whole. *Saint Katharine Dock Company* v. *Higgs*, 641.

II. Levels.

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II. Exemption from rateability.

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III. Dissolution.

1. By what vote it can be effected, 868, 877. Poor, XVI. 1.
2. Division of stock upon, nature of the interest, 868, 878. Poor, XVI. 1.

SOVEREIGN.

I. Distinction between acts of state and personal obligations, 556. Post, II.

II. Plea that defendant is a sovereign prince.

To an action on an annuity deed, defendant pleaded that, at the time of making the deed, he was the reigning sovereign duke of Brunswick and Luneberg; that the deed was made by him within his dominions; and that, from the time of the making thereof until action brought, he had been, and still was, *justly entitled* to all the rights, prerogatives and privileges appertaining to him as the duke of Brunswick and Luneberg.

Held, on demurrer to the replication, that the plea was bad for not stating that defendant was reigning sovereign duke at the time when the action was brought or plea pleaded. *Munden* v. *Brunswick, Duke of*, 656.

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I. Distinct instruments on one paper.

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A bill of parcels, delivered by plaintiff, having at the foot a receipt, written at the same time with the bill, is nevertheless admissible without a receipt stamp, for the purpose of proving that the goods mentioned were sold to a third person and not to the defendant. *Millen* v. *Dent*, 846.

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The clause (sect. 1) of stat. 29 Eliz. c. 4, giving treble damages against sheriffs, &c., taking more than the poundage there allowed, is not repealed by stat. 7 W. 4 & 1 Vict. c. 55, which (sects. 2, 3) permits sheriffs, &c., to take certain additional fees, if previously sanctioned by the Judges, and makes the officer exacting more than the charges so sanctioned punishable as for a contempt.
Therefore, a count in debt, claiming treble damages against a sheriff's officer for exacting, in addition to certain fees sanctioned by the Judges, a sum exceeding the poundage allowed by stat. 29 Eliz. c. 4, was held good on demurrer. *Wrightup* v. *Greenacre*, 1.
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I. Proceedings under stat. 6 & 7 W. 4, c. 71.
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On an inquiry before a Tithe Commissioner under stat. 6 & 7 W. 4, c. 71, respecting the liability of certain lands to tithe, the landowner contended that they were exempt from payment of all tithes, except certain tithes of corn, grain, hay, &c., payable to the Bishop as appropriator thereof; and the vicar of the parish contended that they were liable to the render to him, as vicar for the time being, of all other than the excepted tithes. No one but the vicar claimed the tithes in question. The commissioner decided that the lands were subject to the payment of all tithes, other than the excepted tithes, to the "vicar for the time being." The landowner then delivered to the vicar a feigned issue, which, following the words of the commissioner, raised the question whether the tithes were payable "to the vicar for the time

Held that, as the vicar was the only claimant, and as the commissioner had in terms decided that the tithes were payable to the vicar, the issue was not objectionable on the ground that it improperly raised a question of title, viz. to whom the tithes were payable, instead of the question, simply, whether they were payable at all. *University College* v. *Garton*, 760.

II. Rent charge: replevin.
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TRUSTEE.

I. Liability at law to his cestui que trust.
Omission by cestui que trust to tender receipt.

Stock was bequeathed in trust to pay E., a married woman, the accruing dividends for her sole use; her receipts to be the only good discharges to the trustees. The trustees re-

sum was lodged with their agents, and would be paid to her on her signing a receipt, and on execution by her and her husband of a deed prepared under an order of the Court of Chancery, relating to the trust affairs. H. and her husband did not give the receipt or sign the deed: and, the dividend not being paid, they brought an action for money had and received.

Held, that the deposit with the agents, and notice to H., were not such an appropriation and admission of a balance as made the amount demandable from the trustees without giving H.'s receipt: and that the refusal to give such receipt justified them in withholding the dividend, though they had also demanded, as a condition of payment, execution of the deed, which they had no right so to enforce. *Bond* v. *Nurse*, 244.

II. Ejectment by: against cestui que trust.

1. Within what period.

In 1767 the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H. to attend the inheritance. In 1844 the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defendants also claiming it under title derived through H. The owner of the legal interest in the term had never been in possession. No demand of possession had been made before action brought.

Held, that the action was not maintainable; for if a tenancy at will existed, as between the trustee and cestui que trust, it had not been determined by demand of possession, and, if no tenancy existed such as to render necessary a demand of possession, then the action might have been brought twenty years before, and was, consequently, barred by stat. 3 & 4 W. 4, c. 27, ss. 2, 3. *Doe dem. Jacobs* v. *Phillips*, 130.

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2. No implied contract where there is a special contract not rescinded, 976. Company, V. 1.

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1. Acceptance: Suspension till examination: treatment of the article.

If a purchaser, receiving goods in his warehouse, and intending to examine into their quality, treats them in a manner which materially alters their condition (as by removing glue from hogsheads into bags), it is not necessarily to be inferred from that fact alone that he finally accepts the goods. *Curtis* v. *Pugh*, 111.

2. Binding by part payment, intermediate change in the parties interested as purchasers, 976. Company, V. 1.

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